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Nos. 87-981, 87-1028, 87-1146
Consolidated

In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.,
and PRATT & WHITNEY CANADA, LTD.,

Petitioners,

vs.

JOHN C. RAINEY,

Respondent,

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.,
and PRATT & WHITNEY CANADA, LTD.,

Petitioners,

vs.

RONDI M. KNOWLTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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The three petitions for certiorari were filed by Beech on December 15, 1987 (Case No. 87-981), by BASI on December 18, 1987 (Case No. 87-1028) and by Pratt & Whitney on December 18, 1987 (Case No. 87-1146) The writ(s) of certiorari were granted on February 29, 1988.

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TABLE OF CONTENTS

	Page
Relevant Docket Entries ..... J.A.	1
JAG Investigation Report of Lieutenant Commander William C. Morgan, Jr., U.S.N. regarding subject Accident* ..... J.A.	2
Amended Complaint of John C. Rainey, individually and as Personal Representative of the Estate of Barbara A. Rainey** ..... J.A.	17
Answer of Defendant, Beech Aircraft Corporation and Beech Aerospace Services, Inc. to the Complaint of John C. Rainey ..... J.A.	24
Answer of Pratt & Whitney of Canada, Inc. to the Complaint of John C. Rainey ..... J.A.	29
Pre-Trial Order of the Court in Cases No. 83-4084, 83-4085, March 20, 1985 ..... J.A.	31
Transcript of Pretrial Proceedings in Chambers before District Court, July 10, 1984 ..... J.A.	38
Transcript of testimony at trial of John C. Rainey as an adverse party ..... J.A.	53
Transcript, excerpts from trial relating to the admission of investigative JAG report prepared by Lieutenant Commander William C. Morgan J.A.	79
Edited JAG investigation report prepared by Lieutenant Commander William C. Morgan, as admitted in evidence (without enclosures and endorsements) ..... J.A.	92

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* A catalog of the (60) attachments is included in the reproduced report of LCDR Morgan but the 159 pages of attachments and the chain of command endorsements have been omitted.

** Reproduction of the Complaint and Answers in the Knowlton case are omitted in the interest of brevity. Counsel are agreed that the operative allegations were the same as in the Rainey pleadings.

TABLE OF CONTENTS—Continued

Page

Jury Verdict in Consolidated Case Nos. 83-4084, 83-4085 dated July 20, 1984 ..... J.A. 98

Final Judgment for Defendants, Case No. 83-4084 dated July 23, 1984 ..... J.A. 101

Final Judgment for Defendants, Case No. 83-4085 dated July 23, 1984 ..... J.A. 103

Letter from Lieutenant Commander John C. Rainey, U.S.N.R. to Lieutenant Commander William C. Morgan, Officer for the Judge Advocate General ..... J.A. 104

Panel Opinion of the United States Court of Appeals for the Eleventh Circuit dated March 25, 1986 ..... J.A. 119

Order of the United States Court of Appeals for the Eleventh Circuit dated May 27, 1986 granting Defendant/Appellees Suggestion for Rehearing en banc ..... J.A. 134

En Banc Opinion of the United States Court of Appeals for the Eleventh Circuit dated September 22, 1987 en banc court evenly divided panel opinion reinstated ..... J.A. 136

RELEVANT DOCKET ENTRIES

Plaintiffs' Complaints in Case Nos. 83-4084 and 83-4085	April 15, 1983
Answer to Complaint by Beech Aircraft Corporation and Beech Aerospace Services, Inc., in Case Nos. 83-4085 and 83-4084	May 10, 1983
Answer to Complaint by Pratt & Witney Canada, Inc. in Case Nos. 83-4085, 83-4084	July 6, 1983
Motion to Consolidate Case Nos. 83-4085, 83-4084	February 21, 1984
Plaintiffs' Amended Complaint	January 4, 1984
Pretrial Stipulation of All Parties	March 13, 1984
Pretrial Order	March 20, 1984
Order Consolidating Case Nos. 83-4085, 83-4084	March 20, 1984
Jury Verdict in favor of the Defendants	July 20, 1984
Judgment in favor of the Defendants in Case Nos. 83-4085, 83-4084	July 23, 1984
Plaintiff's Motion for New Trial	August 1, 1984
Order denying Plaintiff's Motion for a New Trial	August 17, 1984
Plaintiff's Notice of Appeal	September 7, 1984
Panel Opinion of Eleventh Circuit Court of Appeal reversing Jury Verdict	March 25, 1986
Order of Eleventh Circuit Court of Appeal Granting Rehearing En-Banc and vacating prior panel opinion	May 27, 1986
En Banc Opinion of the Eleventh Circuit Court of Appeals	September 22, 1987

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN C. RAINEY, individually,
and as Personal Representative
of the Estate of BARBARA A.
RAINEY,

CASE NO. 83-4084

Plaintiff,

vs.

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.,
and PRATT & WITNEY AIRCRAFT OF
CANADA, LTD.,

Defendants.

_____/

RONDI M. KNOWLTON, individually and
as personal representative of the
Estate of DONALD BRUCE KNOWLTON,

CASE NO. 83-4085

Plaintiff,

vs.

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.,
and PRATT & WITNEY AIRCRAFT OF
CANADA, LTD.,

Defendants.

_____/

ORIGINAL JAG REPORT OF LIEUTENANT COMMANDER WILLIAM C. MORGAN, JR., U.S.N. CONCERNING JULY 13, 1982 AIRCRAFT ACCIDENT, AS ORIGINALLY CONSIDERED BY THE DISTRICT COURT

(Enclosures and Endorsements Deleted)

(Filed September 1, 1982)

From: Lieutenant Commander William C. MORGAN, Jr., USN, 1310

To: Commanding Officer, Training Squadron THREE

Subj: Investigation to Inquire into the Circumstances Connected with the Aircraft Accident which Occurred at Approximately 1020, 13 July 1982, Approximately Two Miles Southeast of Middleton Airport in Evergreen, Alabama

Ref: (a) JAG Manual Chapter VI and Section 0902, Chapter IX

Encl: (1) Commanding Officer, Training Squadron THREE appointing order VT-3:11020:my, 5830 of 14 July 1982

(2) Investigation Officer's letter of 12 August 1982 with First Endorsement

(3) Training Squadron THREE 131650Z JUL 82, OP-REP-3Navy Blue/N0393A/001

(4) Personnel Data Base Transactions for LCDR Barbara A. Rainey

(5) Extract from LCDR Rainey's NATOPS Qualification Record

(6) Extract from LCDR Rainey's Standardization Record

(7) Summary of LCDR Rainey's Naval Flight Record

(8) Extract from LCDR Rainey's Aviators Log Book

(9) Training Air Wing FIVE Memorandum of 20 May 1982

(10) Summary of Investigation Officer's Review ENS Knowlton's Administrative and Aviation Records

(11) Extracts from LCDR Rainey's Medical Record

(12) Extracts from ENS Knowlton's Medical Record

(13) Training Squadron THREE's Flight Schedule for 13 July 1982

(14) Extracts from Aircraft Bureau Number 160955 Aircraft History and Inspection Records

(15) Copy of Aircraft Bureau Number 160955's Outstanding Maintenance Action Form

(16) Aircraft Technical Directive No. T-34C-0147 Cover Page

(17) COMNAVAIRSYSCOM 142257Z AUG 81

(18) COMTRAWINGFIVE 022225Z FEB 81

(19) CNO 251703Z JUN 81

(20) CNATRA 092029Z APR 81

(21) COMTRAWINGFIVE 191930Z OCT 79

(22) Aircraft Acceptance and Personnel Record of 13 July 1982

(23) North Whiting Tower Traffic Control Strip of 13 July 1982

(24) Naval Oceanography Command Detachment Form 3750 of 13 July 1982

(25) Statement of LTCOL David I. Habermacher, Jr., USMC

(26) Statement of LT M. P. Hansell, USNR

(27) Statement of ABHAN S. F. Rodgers, USN

(28) Statement of ABHI R. S. Scribner, USN

(29) Statement of 2LT B. D. Pearson, USMC

(30) Statement of ENS W. P. Arrington, USNR

(31) Statement of LT Craig C. Colley, USN

(32) Extract from Naval Air Training Command, Flight Training Instruction, Familiarization Primary, T-34C, 1981

(33) Statement of LCDR Richard E. Blake, USN

(34) Statement of ABH2 Jimmy Wayne Smith, USN

(35) Statement of ABH3 C. A. Miller, USN

(36) Statement of LT Ted J. Choley, USN

(37) Extract from North Whiting Field Operations Duty Officer Log of 13 July 1982

(38) Extract from Middleton Field Crash Crew Log of 13 July 1982

Subj: Investigation to Inquire into the Circumstances Connected with the Aircraft Accident which Occurred at Approximately 1020, 13 July 1982, Approximately Two Miles Southeast of Middleton Airport in Evergreen, Alabama

(39) Extract from HT-18 Operations Duty Officer Log of 13 July 1982

(40) HC-16 Rescue Report of 13 JUL 82

(41) Aerial Photographs of Crash Site

(42) Summary of Investigation Officer's Review of Official Records and Land Deeds Located

at the Conecuh County Courthouse in Evergreen, Alabama

(43) Statement of MAJ T. E. Allen, USMC

(44) Statement of HM2 Steven L. Rayl, USN

(45) Statement of LT Thomas R. Little, USN

(46) Report of Casualty, DD Form 1300 of 15 JUL 82 ICO LCDR Barbara A. Rainey

(47) Report of Casualty, DD Form 1300 of 16 JUL 82 ICO ENS Donald Bruce Knowlton

(48) Commanding Officer, Naval Air Rework Facility, NAS Pensacola, Speedletter 335/503:RLB of 19 AUG 82 (Engineering Investigation on PT6A-25 Engine S/N PWV 58172)

(49) Photographs of Wreakage of 3E955

(50) Photographs of Failing Rotary Buckle Retrieved from the Front Cockpit of 3E955

(51) Photographs of LPA Inflation Lever and Associated CO_2 Cartridges Found in the Wreckage of 3E955

(52) Statement of LCDR G. M. Daniels, MC, USN

(53) Statement of LT R. Kolakowski, USN

(54) Statement of Rondi Knowlton, wife of ENS Donald B. Knowlton

(55) Diagram of Middleton Field Traffic Pattern

(56) Diagram of Wreakage of 3E955

(57) Summary of the 72 Hours Preceeding the Flight of LCDR Barbara A. Rainey as provided by LCDR John Rainey

(58) Copy of Original Claim of Mr. William W. Ward, Standard Form 95

(59) Copy of Autopsy Protocol and Toxicology Report of LCDR Barbara A. Rainey

(60) Copy of Autopsy Protocol and Toxicology Report of ENS Donald Knowlton

PRELIMINARY STATEMENT

1. As directed by enclosure (1) and in accordance with reference (a), an informal investigation was conducted into the circumstances surrounding the aircraft accident which occurred Southeast of Middleton Airport near Evergreen, Alabama, on 13 July 1982.

2. All reasonably obtainable evidence has been compiled and examined during the course of the investigation and all directives of the convening authority have been met. Certain real evidence collected by the Aircraft Accident Board was also obtained, however, considerable care was taken to ensure a separate and accurate investigation.

3. All claims and potential claims for damages by landowners have been investigated. The original claim of Mr. William W. Ward has been hand carried to Naval Legal Service, Pensacola, Florida. No estimates were required with this claim based on a phone conversation with LCDR G. F. Indest of the Naval Legal Service in Pensacola, Florida. The other property owner involved, Mr. Roger Warrick of Gauiter, Mississippi, has been notified of the accident and furnished Standard Form 95 by registered mail.

4. Several witnesses were found that heard the radio transmissions and saw the aircraft just prior to the crash. They all seemed rational and observant. Witnesses inter-

viewed were not designated as parties to the investigation and all were advised of the nature of the JAG investigation.

5. The unusual length of time required to complete this investigation was due to the delay in receiving the autopsy reports on the two pilots and the delay in receiving the engineering investigation on the engine of aircraft 3E955. Additional delays were due to the research required to validate points brought out in the engineering investigation.

FINDING OF FACT

1. At approximately 1020 local on 13 July 1982, a U.S. Navy T-34C aircraft, bureau number 160955, piloted by LCDR Barbara A. Rainey crashed approximately two miles Southeast of Middleton Airport near Evergreen, Alabama, (enclosure (3)).

2. LCDR Barbara A. Rainey, 558-72-0652, USNR, reported to Training Squadron THREE on 16 November 1981, (enclosure (4)). At the time of the accident LCDR Rainey was fully NATOPS qualified (Naval Air Training and Operation Procedures Standardization Program) and Instrument qualified (enclosure (5)) as well as being a qualified familiarization instructor, (enclosure (6)). As of 12 July 1982, LCDR Rainey had accumulated 1331 total flight hours of which 209 were logged in the T-34C total craft. LCDR Rainey had logged 96.2 hours during the 90 days preceeding the accident, (enclosure (7)). LCDR Rainey's Aviator's Log Book indicated no record of previous accidents or flight violations, (enclosure (8)).

3. ENS Donald B. Knowlton, 548-04-6268, USNR, was on active duty and checked into Training Squadron THREE

on 24 May 1982 for duty as a Student Naval Aviator, (enclosure (9)). He had an average flight grade of 2.94 and had accumulated 4.5 hours in the T-34C aircraft, (enclosure (10)).

4. LCDR Rainey was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (11)).

5. ENS Knowlton was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (12)).

6. LCDR Rainey and ENS Knowlton were scheduled to fly Familiarization Flight Four at 0645 on 13 July 1982 by Training Squadron THREE's flight schedule authorizing the flight, (enclosure (13)).

7. Aircraft 160955, A T-34C, was accepted by the Navy on 26 September 1978. Inspection of the aircraft records, history, and logs, revealed that all required maintenance inspections and technical directives had been complied with, (enclosure (14)). There was one outstanding discrepancy, the air-conditioning ground blower door spring was broken, (enclosure (15)).

8. Aircraft Technical Directive No. T-34C-017 which was designed to provide a manual back-up system for fuel metering, (enclosure (16)), was not installed, (enclosure (14)). Although much has been written about the need for a manual fuel control, (enclosures (17), (18), (19), (20) and (21)), it is still not installed in the T-34C aircraft, (enclosure (14)).

9. LCDR Rainey and ENS Knowlton were issued aircraft 160955 and LCDR Rainey signed the acceptance sheet

thereby assuming the responsibility of pilot in command, (enclosure (22)).

10. Review of North Whiting Tower traffic control strips for 13 July 1982 show that aircraft 160955 (3E95) departed North Whiting Field at 0915 local under VFR conditions, (enclosure (23)).

11. The weather observed indicated no conditions that would have a direct effect on the flight, (enclosure (24)). Weather in the Middleton pattern was excellent with no clouds, visibility 5 miles or more, and winds light and from the south, (enclosures (25), (26), (27) and (28)).

12. At approximately 1001, 3E955 entered the pattern at Middleton Field for Runway 18. At least four approaches were flown with a minimum of two "touch and go's" completed prior to the accident, (enclosure (28)).

13. At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned, (enclosures (25), (27), (29), (30), (31) and (32)).

14. Upon receiving notification of a crash and seeing smoke to the southeast of Middleton Field, the crash crew immediately began transit to the crash site, (enclosure (27), (28) and (29)).

15. The wreakage of 3E955 crashed into a farmer's field of cutover timber with scattered trees in the area. The area has slightly rolling hills with a small dirt road passing near the crash site, (enclosure (41)).

16. 3E955 crashed on property owned by Mr. Roger Warrick. Transit to the crash site required that the crash crew

and other vehicles cross property owned by Mr. William W. Ward, (enclosure (42)).

17. During the transit to the crash site, the crash crew had difficulty in locating the wreakage due to the muddy road conditions and the circuitous route required to go around a small stream and fallen trees. Additionally, there were no current, detailed maps of the local area available to the crash crew. 3E467, piloted by LCDR Richard E. Blake, was over the crash site and assumed on scene command and attempted to direct the crash crew to the wreakage, (enclosure (27), (28), (31) and (33)).

18. ABH1 R. S. Scribner stated that at approximately 1022 local, he stopped the crash truck and picked up a civilian who assisted in locating the wreakage of 3E955, (enclosure (28)).

19. LT Ted J. Choley stated that at approximately 1030 local, he received a call from LT Will Carpenter on the base radio stating that there was an accident at Middleton Field, (enclosure 36)).

20. At 1035 local, North Whiting Field operations was notified of a possible aircraft accident near Middleton Field, (enclosure 37)).

21. Upon arrival at the wreakage at 1040 local, the crash crew immediately began efforts to extinguish the fire using AFFF (lite water) and attempted to locate survivors. No response was heard to ABH1 Scribner's call to crew members of the aircraft. The burned bodies of both pilots were noted at this time, (enclosures (27), (28), (34) and (35)).

22. When all the AFFF (lite water) on the truck was depleted, the crash crew used all of the portable fire extinguishers on the truck in an attempt to put out the fire. When this failed, they resorted to shoveling dirt on the fire in an attempt to smother it, (enclosures (27), (28), (31), (34) and (35)). At 1042 local, all fires were extinguished with the exception of a magnesium fire which the crash crew was unable to put out, (enclosure (38)).

23. LCDR Rainey sustained a lethal neck injury at impact but bodily functions continued for an undetermined period, (enclosures (52) and (55)).

24. ENS Knowlton was killed instantly due to massive head injuries sustained at impact, (enclosures (52) and (56)).

25. At some undetermined point in the crash sequence, the rotary buckle holding the shoulder straps of the front cockpit harness failed, (enclosure (50)).

26. At some point during the flight or the subsequent crash, a LPA (life preserver assembly) inflation lever was moved to activated position, (enclosure (51)).

27. At the time of impact, the engine of 3E955 was operating but was operating at reduced power, (enclosure (48)).

28. At 1050 local, HT-18 launched aircraft 171 as a SAR (search and rescue) mission to Middleton Field, (enclosure 39)). The aircraft arrived at the crash site at 1125 local and assumed on scene command from 3E467. 3E467 was relieved from communications relay duties at 1130 local, (enclosure (33)).

29. Upon landing at the site, the crew of aircraft 171 was informed that there were no survivors, (enclosures (43), (44) and (45)).

30. At 1050 local, HC-16 was notified by phone of an aircraft accident near Middleton Field. At 1105 local, a UH-IN launched and proceeded to the crash site., arriving there at 1150 local. Upon landing, HC-16 was requested to transport the bodies of the victims to NARMC (Naval Aerospace Regional Medical Center). The remains of the pilots were removed from the wreakage, placed in body bags, and moved to the helicopter. Takeoff from the crash site was at 1430 local and arrival at NARMC was at 1515 local. The remains were taken from the helicopter and placed in an ambulance for transportation to the hospital, (enclosure (40)).

31. An Engineering Investigation was conducted on the engine of aircraft 160955 by the Naval Air Rework Facility, NAS Pensacola, Florida, (enclosure (48)).

OPINIONS

1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically, or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

5. Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground. However, from evidence available and the information gained from eyewitnesses, a possible scenario can be constructed as follows:

a. 3E955 entered the Middleton pattern with ENS Knowlton at the controls attempting to make normal landings.

b. After two unsuccessful attempts, LCDR Rainey took the aircraft and demonstrated two landings "on the numbers". After getting the aircraft safely airborne from the touch and go, LCDR Rainey transferred control to ENS Knowlton.

c. Due to his physical strength, ENS Knowlton did not trim down elevator as the aircraft accelerated toward 100 knots; in fact, due to his inexperience, he may have trimmed incorrectly, putting in more up elevator.

d. As ENS Knowlton was climbing to pattern altitude, he did not see the aircraft established on downwind so he began his crosswind turn. Due to ENS Knowlton's large size, LCDR Rainey was unable to see the conflicting traffic.

e. Hearing the first call, LCDR Rainey probably cautioned ENS Knowlton to check for traffic. Hearing the second call, she took immediate action and told ENS Knowlton she had the aircraft as she initiated a turn toward an upwind heading.

f. As the aircraft was rolling from a climbing left turn to a climbing right turn, ENS Knowlton released the stick letting the up elevator trim take effect causing the nose of the aircraft to pitch abruptly up.

g. The large angle of bank used trying to maneuver for aircraft separation coupled with the abrupt pitch up caused the aircraft to stall. As the aircraft stalled and went into a nose low attitude, LCDR Rainey reduced the PCL (power control lever) toward idle. As she was rolling toward wings level, she advanced the PCL to maximum to stop the loss of altitude but due to the 2 to 4 second lag in engine response, the aircraft impacted the ground before power was available.

6. Although the above sequence of events is the most likely to have occurred, it does not change the possibility that a "rollback" did occur.

7. The most probable cause of the accident was the pilots failure to maintain proper interval.

8. There are many items that are considered as possible contributing factors to the accident. They are listed as follows:

a. The design of the aircraft which limits forward visability when in a climb.

b. The performance of the engine from idle to max power and the associated lag.

c. The relative size of the individuals, ENS Knowlton's size and strength could enable him to overpower LCDR Rainey in a panic situation.

d. The possibility that an LPA (life preserver assembly) was inflated at a critical time.

e. The inability of early stage students to trim correctly.

9. The Middleton Crash Crew and the RDO (Runway Duty Officer) acted in a very professional manner.

RECOMMENDATIONS —

1. That the claim of Mr. William W. Ward be honored.

2. That a flight for the NATOPS syllabus be designed to familiarize all pilots with the different type stalls that may be encountered.

3. That landing lights be used in the landing pattern to enhance visibility of aircraft established downwind.

4. That every effort be made to incorporate Aircraft Technical Directive No. T-34C-0147 at the earliest possible date.

/s/ W. C. Morgan, Jr.
W. C. MORGAN, JR.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN C. RAINEY, Individually
and as Personal Representative of
the Estate of BARBARA A. RAINEY,

Plaintiff,

v. PCA 83-4084

BEECH AIRCRAFT CORPORATION, et al.,

Defendants.

AMENDED COMPLAINT

The plaintiff files this his Amended Complaint previously filed herein as to paragraphs 11, 13 and 23, as follows:

JURISDICTIONAL ALLEGATIONS

1. This is an action for damages in excess of $10,000.00 against defendants who are each foreign corporations. Jurisdiction of this case arises under 28 U.S.C. 1332(a)(2).

2. The plaintiff, a resident of Escambia County, Florida, is the duly appointed personal representative of the estate of his deceased wife, Barbara A. Rainey, and brings this action on behalf of himself, the estate of decedent, and the decedent's minor children Cynthia Rainey and Katharine Rainey.

3. On July 13, 1982, Barbara A. Rainey, a resident of Escambia County, Florida, was employed as an instructor pilot for the U.S. Navy, stationed at NAS Whiting Field, Milton, Santa Rosa County, Florida.

4. Defendant, Beech Aircraft Corporation (Beech), is a Delaware corporation engaged, at all times material to this Amended Complaint, in the business of manufacturing T-34C Turbo Mentor Aircraft, which were sold by it to the U.S. Navy to serve as a flight training aircraft at NAS Whiting Field. As is more particularly alleged hereinafter, defendant Beech did manufacture and sell this aircraft which, while being used in the ordinary course of its intended use in and around Florida, and which, while being used in its ordinary course of trade, use or consumption in Florida, resulted in death to the decedent. This Court has jurisdiction over Beech pursuant to the provisions of Section 48.193, Florida Statutes, 28 U.S.C. 1332 (a)(2), and Rule 4(e), Fed.R.Civ.P.

5. Defendant, Beech Aerospace Services, Inc. (BASI), is a Kansas corporation, which is in the business of servicing, maintaining and repairing the Beech T-34C aircraft for the U.S. Navy, at NAS Whiting Field, Milton, Florida. Thus, it carries on a business venture in this state and has an office in this state. At all times material to the allegations contained in this Amended Complaint, BASI maintained, repaired and serviced the Beech aircraft that were operated at NAS Whiting Field and more specifically, the T-34C aircraft in which decedent was killed. This Court has jurisdiction of BASI under Section 48.193(1) (a)(b), Florida Statutes, 28 U.S.C. 1332(a)(2), and Rule 4(e), Fed.R.Civ.P.

6. Defendant, Pratt & Whitney Canada, Inc. (Pratt-Whitney), manufactured the engine which was incorporated into the Beech T-34C aircraft in which decedent was killed. This engine was used in the ordinary course of

trade, use or consumption in Florida, and the Court has jurisdiction over Pratt-Whitney under Section 28.193(1) (a)(b), Florida Statutes, 28 U.S.C. 1332(a)(2), and Rule 4(e), Fed.R.Civ.P.

COUNT I—STRICT LIABILITY AGAINST BEECH AND PRATT-WHITNEY

7. The plaintiff incorporates and re-alleges all allegations of paragraphs 1 through 6 of the Amended Complaint.

8. Sometime prior to 1978, the defendant Beech manufactured the T-34C Turbo Mentor Aircraft, Navy BUNO 160955.

9. This aircraft was equipped with a turbine engine which was manufactured by Pratt-Whitney.

10. Defendant Beech sold this aircraft to the U.S. Navy on or about September or October of 1978 to be used in pilot training at NAS Whiting Field, Milton, Florida.

11. The aircraft and engine were equipped with a pneumatic fuel control system which was defective in its design and/or manufacture in that it was prone to malfunction in such as way as to cause "power interruptions" ("power interruptions" as used herein includes the following: engine tends towards minimum flow; reduction to minimum flow; engine failure to respond to PCL movement; power interruption; reduction to low power; failure of engine to increase power; engine RPM hanging at low RPM or power; engine hangs on start; power reduction; engine power response problem; failure of pneumatic side of fuel control; and engine rollback.) such that the pilot

of the subject aircraft was unable to sustain sufficient power to maintain flight. Engine power interruptions had, for several years prior to the decedent's accident on July 13th, 1982, been experienced by the Naval Air Training Command.

12. This defect is one which existed at the time the aircraft and engine left the hands of Beech and Pratt-Whitney, and rendered the aircraft unreasonably dangerous to the user.

13. On or about July 13, 1982, Barbara A. Rainey was issued a T-34C aircraft BUNO 160955 (955) by BASI, for a flight originating from and returning to NAS Whiting Field. During a training "touch-and-go" exercise, as a result of the defect alleged herein, the decedent's aircraft encountered a power interruption and crashed. At the time of the accident the aircraft was being used for its intended purpose by the decedent.

14. As a result of the defective fuel control system of the engine manufactured by defendant Pratt-Whitney, and incorporated into the aircraft manufactured by defendant Beech, the decedent Barbara A. Rainey was killed. By reason of her death, her surviving spouse and two children have suffered and will continue to suffer extreme mental and emotional pain and suffering, and they have been deprived of her comfort, society, protection, guidance, training, companionship, support and services. In addition, her estate has incurred funeral bills.

WHEREFORE, plaintiff prays for a judgment for damages against Beech and Pratt-Whitney, and prays for a trial by jury as to all issues so triable.

COUNT II—NEGLIGENCE OF DEFENDANTS BEECH AND PRATT-WHITNEY

15. The plaintiff re-alleges and incorporates herein by reference paragraphs 1 through 14 of the Amended Complaint.

16. Defendant Beech Aircraft, in designing and manufacturing the aircraft as alleged in Count I, was negligent in that it knew or should have known that the aircraft was defective in the respect set forth in paragraph 11 of the Complaint and that this defect would expose, to those persons using the aircraft for the purpose for which it was intended, an unreasonable risk of harm.

17. Defendant Pratt-Whitney, in designing and manufacturing the engine as alleged in Count I, was negligent in that it knew or should have known that the engine was defective in the respect set forth in paragraph 11 of the Complaint and that this defect would expose, to those persons using the aircraft for the purpose for which it was intended, an unreasonable risk of harm.

18. As a result of the negligence of the defendants Beech and Pratt-Whitney, the decedent Barbara A. Rainey was killed. By reason of her death, her surviving spouse and two minor children have suffered and will continue to suffer extreme mental and emotional pain and suffering, and they have been deprived of her comfort, society, protection, guidance, training, companionship, support and services. In addition, her estate has incurred funeral bills.

WHEREFORE, plaintiff demands judgment for damages against Beech and Pratt-Whitney, and a trial by jury.

COUNT III—NEGLIGENCE OF BEECH AEROSPACE SERVICES, INC.

19. The allegations of paragraphs 1 through 18 are incorporated and re-alleged.

20. Defendant BASI had a duty to maintain, service and repair the subject T-34C aircraft, and it had a duty to assure that it was at all times mechanically safe for the flight. On July 13, 1982, BASI issued to decedent aircraft BUNO 160955 when it knew or should have known there was a defect in the fuel control system of this aircraft, as described in paragraph 11. This defect rendered it unreasonably dangerous to those persons using the aircraft. BASI thereby negligently exposed the decedent to a foreseeable risk of serious bodily harm or death.

21. As a result of the negligence of the defendant BASI, the decedent Barbara A. Rainey was killed. By reason of her death, her surviving spouse and two minor children have suffered and will continue to suffer extreme mental and emotional pain and suffering, and they have been deprived of her comfort, society, protection, guidance, training, companionship, support and services. In addition, her estate has incurred funeral bills.

WHEREFORE, plaintiff demands judgment for damages, and a trial by jury.

COUNT IV—PUNITIVE DAMAGES

22. The plaintiff re-alleges and incorporates herein by reference paragraphs 1 through 21 of the Amended Complaint.

23. At all times material to the allegations herein, the conduct of the defendants Beech, Pratt-Whitney and

BASI was in reckless disregard for the safety of decedent and other persons who they knew would fly the aircraft. The defendants knew that the aircraft was defective and unreasonably dangerous as alleged in paragraph 11 in the Amended Complaint, and the defect was known for several years prior to decedent's death. That is, the T-34C turbo jet engine was, for several years prior to July 13th, 1982, known to encounter "power interruptions" often for reasons never explained or discerned by the defendants. They were aware that a manual fuel control system was needed and available for this particular aircraft and they recklessly did not include such control either on the date of manufacture or sale, or at some other time in advance of the decedent's death. The defendant's manufacture, distribution and sale of said engine and aircraft without the manual fuel control, or without later redesigning and retrofitting the product to correct the defect or override it, amounted to a conscious indifference to the safety of the decedent and others who might be harmed by the product. The conduct of BASI in certifying the decedent's aircraft safe for flight, with knowledge of the foregoing, and with firsthand knowledge of prior and numerous complaints of engine rollbacks in T-34C aircraft, amounted also to a conscious indifference to the safety of the decedent and others who might be harmed by the product.

WHEREFORE, plaintiff demands a judgment for punitive damages, against defendants Beech, Pratt-Whitney and BASI, and a trial by jury as to all issues so triable.

(Certificate omitted)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. PCA 83-4084

(Caption omitted)

ANSWER

The Defendants, BEECH AIRCRAFT CORPORATION, a Delaware corporation, (hereafter BEECH), and BEECH AEROSPACE SERVICES, INCORPORATED, a Kansas corporation, (hereafter BASI), for answer to the original complaint filed in the above styled cause, say seriatum:

They have no knowledge of the Plaintiff's status as called out in the preamble to the complaint and, accordingly, denying the same pending discovery.

JURISDICTIONAL ALLEGATIONS

1. The first sentence is denied. The second sentence is admitted.

2. Unknown and denied pending discovery.

3. Unknown and denied pending discovery.

4. BEECH admits that it manufactured certain aircraft including a model commonly called T-34C. The balance of paragraph 4 is denied.

5. BASI admits that it does some service and maintenance repair work on Navy aircraft including the T-34C model. The balance of paragraph 5 is denied.

6. The T-34C aircraft is powered by a Pratt and Whitney engine. To the best of these Defendants' knowledge, the downed aircraft had such an engine. The balance of paragraph 6 is denied.

COUNT I

7. Denied, except as admitted in paragraphs 1 through 6 above.

8. BEECH admits that it manufactured aircraft similar to the one described in the complaint. The balance of paragraph 8 is denied.

9. These Defendants admit that the engine of the downed aircraft was manufactured by PRATT AND WHITNEY, otherwise paragraph 9 is denied.

10. The subject aircraft was sold to an arm of the United States Government, otherwise said paragraph is denied.

11. Denied.

12. Denied.

13. Unknown and denied.

14. Denied.

COUNT II

15. Denied.

16. Denied.

17. Unknown and denied.

18. Denied.

COUNT III

19. Denied.

20. Denied.

21. Denied.

COUNT IV

22. Denied.

23. Denied.

FURTHER ANSWERING

24. The Defendants, BEECH and BASI, and each of them, say they are not guilty.

25. All allegations of negligence, breach of duty, proximate cause, legal cause, warranty, expressed or implied, strict liability, defects, unreasonableness, wantonness, recklessness, indifference, injury and damage are denied.

26. All parts, portions, counts and allegations of the complaint not specifically admitted are denied.

27. The Plaintiff's decedent knowingly assumed the risks, if any there were, in flying the described aircraft under existing conditions at the time and place of the subject accident.

28. The Plaintiff's decedent as pilot in command of the subject aircraft was negligent and careless in the operation/piloting of the aircraft in question at the time and place of the accident and prior to the actual occurrence of the accident. By reason of such neglect, carelessness and negligence on the part of the instructor pilot/pilot in command, she cause or contributed to the happening of the accident. In consequence of such conduct, Plaintiff's claim is barred in law or, in the alternative, such claim

is diminished under the doctrine of comparative negligence and in accordance with the degree or percentage of negligence which shall be ascribed to such pilot in command.

29. Defendants reallege and reaver paragraph 28 above and additionally aver that at all times material the pilot(s) of the subject aircraft failed to follow and/or violated applicable FARs and/or documented and recognized procedures for the handling and maneuvering of the subject aircraft in flight, under existing circumstances then at hand.

30. The subject aircraft and controls were negligently entrusted to an unskilled pilot prior to and at the time of the subject accident.

31. The subject aircraft was misused in the circumstances just prior to crash.

32. The subject aircraft was abused in the circumstances just prior to the crash.

33. The subject aircraft was used at the time and place in question for purposes and in a manner for which it was neither designed nor intended.

34. The subject aircraft was fabricated, manufactured and certified in accordance with all applicable United States Government standards and specifications.

35. The instructor pilot and the student pilot failed to properly pre-flight the subject aircraft prior to departure on July 13, 1982, from NAS Whiting, Florida.

36. The instructor pilot and the student pilot were at all times material engaged in a joint venture. In the

premises, the negligence and carelessness of each is imputed to the other.

37. The Plaintiff's decedent violated established flight rules governing the flight of military aircraft and in doing so caused or contributed to the happening of the subject accident.

38. The happening of the accident in question was directly due to the negligence of the United States Navy.

39. These Defendants aver that the law of Alabama governs disposition of the matters and things in controversy in the above styled cause.

(Certificate omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

(Caption omitted)

ANSWER OF PRATT & WHITNEY CANADA, INC.

Pratt & Whitney Canada, Inc. answers the complaint and says:

1. It admits that this court has jurisdiction over the parties and the subject matter of this case.

2. Without knowledge.

3. Without knowledge.

4. Admitted.

5. Admitted.

6. Its name has been changed to Pratt & Whitney Canada, Inc. It admits the remaining allegations of this paragraph.

7. No answer required.

8. Admitted.

9. Admitted.

10. Admitted.

11. Denied.

12. Denied.

13. Without knowledge.

14. Denied.

15. No answer required.

16. Denied.

17. Denied.

18. Denied.

19. No answer required.

20. Without knowledge.

21. Denied.

22. No answer required.

23. Denied.

(Certificate omitted)

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN C. RAINEY, Individually
and as Personal Representative
of the Estate of BARBARA A.
RAINEY,

Plaintiff,

vs. PCA 83-4084 WEA

BEECH AIRCRAFT
CORPORATION, et al.,

Defendants.

_____/

RONDI M. KNOWLTON, Individually
and as Personal Representative of
the Estate of DONALD BRUCE
KNOWLTON,

Plaintiff,

vs. PCA 83-4085 WEA

BEECH AIRCRAFT
CORPORATION, et al.,

Defendants.

_____/

PRETRIAL ORDER

(Filed March 20, 1984)

All matters incorporated in the pretrial stipulation will be made a part of the pretrial order, except to the extent such may be altered, amended or changed at the pretrial conference.

1. There was brought on for discussion at hearing the motion for summary judgment filed by Beech Aircraft Corporation. In connection with the motion Beech, citing *McKay v. Rockwell*, 702 F.2d 444 (1983), contended that, under the test there announced, there was shown that Beech came within those tests so that it was entitled to assert in this case a government contractor defense. The plaintiff oppose on two grounds. One was the ground that the underlying facts, as discussed and brought to light at this hearing, did not show that there was no genuine issue as to any material fact if in this case the *McKay* test were applied.

The other ground of opposition by the plaintiff was that, in any event, the *McKay* doctrine should not be applied and was not the law in Fifth Circuit or in Florida so that such was another reason why the motion should be denied.

The court concluded that, respecting the *McKay* test, there were genuine issues of material fact so that the motion for summary judgment should be denied, under the application of the factors. Since it finds that it must be denied, even if those factors were applied, it does not find it necessary at this time to make determination respecting the plaintiff's second contention.

2. Beech's motion to consolidate (Rainey PCA 83-4084) this case with the companion case of Knowlton, PCA 83-4085 is granted, the parties at the hearing agreeing that such motion for consolidation should be granted. The two cases are consolidated for all purposes including consolidation for trial.

3. Respecting the first issue of law concerning strict liability in the *West Caterpillar* case, no ruling at this time is made upon it. It was pointed out to the court at hearing that, under the *West* case, the court has said strict liability should be imposed only when a product to be manufactured is placed on the market knowing that it is to be used without inspection for defects and proves to have a defect that causes injury. There were cited to the court at the hearing the subsequent Court of Appeals case of *Harden v. Montgomery*, 85 S.2d 331, in which some distinction in that language apparently was made.

This issue of law does not apply to the defendant BASI.

4. Respecting the legal issue of government contractor defense, at the pretrial hearing the court tentatively concludes that such defense will be available to the defendants Beech and Pratt-Whitney provided the facts adduced at trial support such a defense, and the *McKay* test is applied.

Respecting BASI the position taken at pretrial conference by plaintiffs was that they were not trying to hold this defendant liable on strict liability but only for negligence. This defendant contends that if it had a contract, and performed it according to that contract without being negligent, then there is no liability; that is an agreed principle of law at the pretrial conference. The sole issue regarding this defendant is whether it negligently performed the work and its negligence proximately resulted in injury.

In the foregoing statement respecting availability of this public contractor defense, the court does not at this

time foreclose, as it did not on the summary judgment ruling, the question whether in any event the *McKay* doctrine is applicable in this case.

5. Respecting the legal issue 7, that is to say whether the negligence of either occupant of aircraft is imputed to the other because of the joint venture doctrine, the court concludes at pretrial conference that the answer is no. Here the plane, on an authorized plane flight, had one officer of the Navy in charge of the plane and conducting a training program for a student who was also in the Navy, so that there could not have been, and was not, equal authority.

6. Respecting issue 6, concerning the question who are employees of defendants for purposes of punitive damages under the *Mercury Motors* decision in Florida the ruling of the court at pretrial conference is that *Mercury* has no application in this case since that case is not applicable to a products liability punitive damages case. In this case the plaintiffs assert that the manufacturers Beech and Pratt-Whitney placed a defective and dangerous product into the stream of commerce with willful disregard to safety. Under the law, as this court understands it, punitive damages could be sought under a proper factual situation with vicarious responsibility playing no part in determination.

7. Respecting issue No. 8, concerning prior or subsequent incidents as admissible, it is not disputed at pretrial conference that evidence respecting prior or subsequent incidents is admissible provided they meet the substantial similarity test that is involved.

At pretrial conference plaintiff did say that plaintiff wanted to present some evidence of the installation on this particular aircraft of a manual fuel control of emergency power line that was accomplished after this accident but that had been on the drawing boards and planned before the accident. This could only come under the rule for the purpose of showing the feasibility of precautionary measures. However, parties at the pretrial conference indicate that there is no issue that this was not feasible and would have been feasible at all times prior to the accident. If that is the situation that is presented at trial then the court believes that such evidence should probably be precluded on the ground that, even if relevant, it should not be admitted under Rule 403, Federal Rules of Evidence.

8. Respecting issue No. 9, @ pretrial conference the court concludes that the JAG report provide the criteria and the trustworthiness would be admissible but would be admissible only on its factual findings and would not be admissible insofar as any opinions or conclusions are concerned.

At pretrial conference, with the parties' agreement, the defendants who wish to present this matter into evidence will, within 10 days after date, provide the plaintiffs with excised portions of it they wish to present. If plaintiff is in disagreement, and the parties cannot reconcile their differences, then both parties will report any differences to this court with each party providing a memorandum in support of its respective position so that ruling may be made, if at all possible, in advance of trial.

9. The court concludes at pretrial conference, and so advised the parties, that this case would be bifurcated for

trial with liability first resolved and, if liability is found, with the issue of damages then to be resolved. If liability is found the same jury that considered liability will also be the jury that will consider the question of damages.

10. At pretrial conference the court was advised that portion of a videotape deposition taken did not come through on the tape although the verbal transcription was there so that a complete transcript is available. The defendants contend that, since part of this is missing for videotape purposes, it must be treated as an ordinary deposition with no part of the videotape used. The plaintiffs contend that they can use all of their videotape and go to the part where some is left out and read that into the record with the deposition then resumed where it comes back on the videotape.

The court's ruling at the pretrial conference is that in this regrettable situation, since the videotape deposition does not comply with the requirements of the rule, although through no fault of the parties, the defendants' objections to it are well taken. The court will entertain motion on the part of plaintiffs to retake this deposition by videotape should the plaintiffs wish to present it in that fashion and if such may be taken in time so as not to interfere with the trial of the case.

11. At pretrial conference, it being pointed out to the court that, as the pretrial stipulation points out, the parties have stipulated that the opinion testimony of retained experts previously deposed would be limited at trial to opinions expressed in the depositions as to which inquiry was made except as to those matters addressed in the deposition of Dr. Craig. At pretrial conference

this stipulation between the parties is approved by the court.

12. After date, and in no event later than two weeks before trial, the parties will endeavor to agree on the full and complete set of instructions to be given in this case with plaintiffs taking the initiative in that regard. Should the parties have any particular instruction on which they cannot agree then their differences will be reported to the court with a memorandum from each party in support of that party's position so that, to the extent feasible, such might be resolved in advance of trial.

The parties will also endeavor to agree on form of verdict.

13. This case is set for trial before the court, and with a jury, commencing at 9:30 a.m. on Monday, July 9, 1984, with estimated time of trial being two weeks.

14. The notes of the pretrial conference are designated as the pretrial order in each of these consolidated cases (Rainey, PCA 83-4084 and Knowlton, PCA 83-4085).

DONE AND ORDERED this 20th day of March, 1984.

/s/ Winston E. Arnow
WINSTON E. ARNOW,
Senior Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN C. Rainey, individually and
as Personal Representative of the
Estate of BARBARA A. RAINEY,

Plaintiff,

vs. Docket No. PCA 83-4084

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES,
INC., and PRATT AND WHITNEY
AIRCRAFT OF CANADA, LTD.,

Defendants.

_____/

RONDI M. KNOWLTON,
individually and as Personal
Representative of the Estate of
DONALD BRUCE KNOWLTON,

Plaintiff,

vs. Docket No. PCA 83-4085

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES,
INC., and PRATT AND WHITNEY
AIRCRAFT OF CANADA, LTD.,

Defendants.

_____/

Pensacola, Florida
July 10, 1984
2:00 o'Clock, P.M.

TRANSCRIPT OF PROCEEDINGS IN CHAMBERS
BEFORE THE HONORABLE WINSTON E. ARNOW

SUNCOAST REPORTING

Court Reporters
125 S. Alcaniz Street
Pensacola, FL 32501

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For the Defendant Beech Aircraft Corporation:
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For the Defendant Pratt & Whitney Aircraft of Canada:
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For the Defendant Beech Aerospace Services, Inc.:
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(p. 3) The Court: At this hearing, it is the ruling of the Court that, notwithstanding the failure of compliance with the pre-trial order in some respects, that this Court should nevertheless allow the defendants to place in evidence before the Jury the findings of facts, 31 in number, that were in the JAG report. What was the date of it, September 1st?

Mr. Harrell: September 1st is stamped on it.

The Court: That's shown as Exhibit 266 in the file. It's stamped September 1st, 1982.

At this hearing, the Court also, in light of the authorities it has considered and pursuant to its discussion at this hearing, holds that the opinions attached to those 31 findings may also be admitted, to the extent that they are opinions and conclusions. In that connection, various matters in there would not be allowed in.

Paragraph five is nothing but a possible scenario, as it's called, and would not be allowed in. Paragraph eight talks about possible contributing factors and it would not be allowed in. Paragraph nine, which says somebody acted in a very professional manner, would not be allowed in because it is not relevant.

All of this is done over the objection of plaintiffs, whose objections are noted on the record as follows:

(p. 4) Mr. Partington. If it please the Court, the plaintiffs object to the order; first, on the basis that the specific regulation which provides for the JAG investigation requires the investigator to make separate findings of fact and opinions, and to carefully distinguish those; and that under the applicable law in the Fifth Circuit, which

is the *Smith* case, the Fifth Circuit very carefully delineated the difference between findings and evaluations and opinions in *Smith* versus *Ithica Corporation* at 612 F.2d 215, and specifically held that only factual findings—which meant just that, factual findings—could be admitted and that opinions and evaluations otherwise were not to be admitted, and that is the law of the Fifth Circuit.

We also object on the grounds that the plaintiffs—

The Court: To bolster that, that decision, at least, was passed at a time when there was not any precedent in the 11th Circuit. It was Fifth Circuit law, but it came at a time—it's precedent in the 11th Circuit. There was one of the cases that they cited that was a Fifth Circuit case that came on after the *Smith* case, and while it's informative, it's not binding because it came out after the proper date.

All that, I took into consideration in my ruling. I point that out for you.

Mr. Partington: I understand that. Also, the (p. 5) other basis, of course, is that the plaintiffs feel they have been unduly prejudiced by the failure of the defendants to comply with the pre-trial order and, in fact, to fully brief the matter for the pre-trial conference, and we object to any of the opinions.

In that connection, Judge, we would respectfully request that the Court allow the plaintiffs an opportunity, in light of its finding and ruling made at the time, to review the JAG report for purposes of anything we might consider that we might wish to offer that might go to the conclusions—

The Court: Go to the conclusions?

Mr. Partington: To the opinion, which the Court referred to, which is that the most probable cause was a failure to keep proper interval, and that we be given leave, in the event we so decide, to call as a witness such person or persons who might not have been called at this trial, but who could present evidence concerning that conclusion and the trustworthiness of it.

The Court: Do you want to be heard on that?

Mr. Womack: Beech has no objection to that procedure.

Mr. Toothman: We wouldn't object to this opportunity to—

The Court: Nobody around the table is objecting to it?

(p. 6) (No negative response was elicited.)

The Court: With no objections from the other parties, sir, you're given that permission.

Mr. Partington: We respectfully also believe that the Court should give an appropriate instruction concerning this, so that the jury does not give undue weight to it as opposed to any other item of evidence in this case.

The Court: I don't know what you mean by an appropriate instruction, but I'll be happy to consider any instruction you wish to prepare.

It comes along under the exceptions of the hearsay statement and evidence rule, if that's what you mean. That's the basis for its admission here.

Mr. Partington: I'm talking about the instruction that is usually given, which says that the jury is the sole trier of facts and it is required to make its own evaluations and conclusions—

The Court: Don, they will do that. If I do that, in fairness, every time some evidence comes in, I'd have to say, "Here, this evidence is admissible, but you're the one to determine whether or not it establishes facts." You don't just do that for part of the evidence.

Mr. Partington: Right.

The Court: I'll be willing to consider any instructions you prepare at the time.

(p. 7) Mr. Partington: Your Honor, we also have filed a motion in limine, particularly directed to two things. The defendants have indicated that it is their intent to call John Rainey and castigate him for attempting to get certain information into the JAG report and, thereby, to create some sort of an inference that he is guilty of wrongdoing, and there should be no reference to that because it was his right to work with the Judge Advocate General's office and those responsible for the investigation. They should be instructed that they are not to inquire into that matter. It is irrelevant and immaterial to the issues before this jury.

Mr. Toothman: May I respond to that, Your Honor?

The Court: Yes, sir.

Mr. Toothman: I'm not sure he has properly categorized our intent with regard to Lieutenant Commander Rainey. However, I will say this, Lieutenant Commander

Rainey wrote certain letters in which he expressed his opinion of what happened, after his investigation, and some of those are admissions against his interest.

The Court: How would it be an admission against his interests?

Mr. Toothman: Because he said his wife was upset, that she had been pressured, things of that nature, (p. 8) after his investigation.

Now, I have the right to ask that man, "After your investigation, sir, didn't you form the opinion that your wife had been pressured, she had tried to cancel the flight and wasn't allowed to do it, that she was upset, uncharacteristically heated?" That was his belief after his investigation and his statement—

The Court: Under what evidentiary rule does that come in?

Mr. Toothman: That comes in as an admission against interest.

The Court: Admission against interest that he had an opinion of some kind?

Mr. Toothman: Yes, those opinions are against his interests.

The Court: It might be against his interests, but it wouldn't provide any relevant evidence on his claim.

Mr. Toothman: Yes, sir, it would. It goes to her negligence. It goes to Mrs. Rainey's possible negligence.

The Court: His opinion about her state of mind is admissible to show that state of mind?

Mr. Toothman: Yes, sir. He's a party.

Mr. Gaines: We're talking about an admission, not an opinion, of somebody who conducted an investigation.

(p. 9) The Court: We're now talking about that he comes along and he had formed an opinion about the state of mind of his deceased wife.

Mr. Toothman: Absolutely.

The Court: And so we say that that is an admission against interest on his part, because it goes into an admission of the state of mind of his deceased wife. I don't know about that one. Does anybody want to show me law on it? I don't know.

Mr. Larry: Could I be heard on that, please?

The Court: It ought to be under the evidence rules.

Mr. Larry: May I be heard on that point?

The Court: Yes.

Mr. Larry: John Rainey was not even in Florida when she had this accident, so he has no personal knowledge of what her state of mind was. Any opinions he formed were pure speculation from talking to someone else, and he put together possible thoughts and scenarios and opinions, not based on any knowledge.

The Court: He's got a point. If he hadn't had a chance to talk with her—if he was testifying as to his own impressions about her, it would be something else, but if he's not doing that—

Mr. Toothman: Let me put it to you this way. (p. 10) It's a statement of her conduct, after investigation. It's

simply my position that if—let's forget it's an airplane. Let's say I hear my wife is in an automobile accident. I go home and ask everybody about it who witnessed it and I talk to them and come to the conclusion that my wife was upset and probably not handling the car very well, and I make such a statement and then I sue for her death. That statement is—I can be held to that statement.

The Court: I can understand a statement against interest would be in an automobile accident where, if I was the driver, and right after the accident, said, "My Lord, I was scared," I could see that. But when you come along to me and you tell me that you can come in here with a statement against interest by a representative who makes his statement based upon what he's gone around and seen and observed and assumed from some other people, and he now says that this was her state of mind—

Mr. Toothman: It's not a representative, it's him. He's the man that made the statement; he's the party.

Mr. Partington: Judge, we have two parties in this lawsuit, we have four children.

The Court: Who do we have?

Mr. Toothman: He's the personal representative—

Mr. Partington: He's the personal representative—

The Court: He sues for everybody else?

(p. 11) Mr. Toothman: Yes, sir. He's the personal representative.

Mr. Gaines: He's also a survivor. It just happens, Your Honor, that we had this point in an appeal a couple of years ago, in which Dick Warfield was attempting to

get in some statements made by a store manager who had no personal knowledge of the circumstances; and the cases, maybe a little bit surprisingly, hold that it doesn't make any difference whether he knows it or not. If it's a statement that he makes, it's an admission, no matter what his basis is for believing that is a fact. If he makes it as a factual statement—

The Court: That was in the Florida State Court, sir?

Mr. Gaines: There are cases throughout the country.

The Court: Somebody better give me some law on this thing.

Mr. Partington: Judge, what I'm saying is this, they are going to try to show that John Rainey tried to get the JAG investigation revised or changed, and I think that is improper, Judge.

Mr. Toothman: Your Honor, I have no such intent, and express it to the Court. I don't have any such intent.

(p. 12) The Court: I would think that was improper, too.

Mr. Toothman: I don't have any such intent. I merely want to hold that man to his statement of opinions.

Mr. Partington: Then there will be no, "Didn't you send this into the JAG office?"

Mr. Toothman: "I'll say did you write a letter.

Mr. Partington: I think we should take those as they come up.

Mr. Womack: We're not going to call Mr. Rainey until next week, if at all, so the Court will have some time—

The Court: Well, we don't know when he's going to put him on the stand. He might be his first witness, I don't know.

Mr. Womack: They told me they were not going to call him.

Mr. Harrell: They represented to us that they were not.

The Court: I know you're going to give me some law on this admission against interest thing.

On that other point, on the face of it, I couldn't see—the fact that he wrote letters and tried to get another investigation, I don't see how that has any relevance in this case whatsoever.

(p. 13) Mr. Toothman: I don't propose to show that. I'll hold the letter up to him. If he denies he said it, I'll say here it is.

Mr. Partington: The other point we want to bring out on these—

The Court: Do I need to make a note on these?

Mr. Larry: It's on the record.

The Court: On the question of Commander Rainey, the statements that he made in a letter, to the effect that his wife was upset and under pressure, the defendants wish to present this as an admission against interest. Before the Court the representation was made that he did this, not from any personal knowledge at all on his part, but from an investigation that he personally conducted with people, friends, and neighbors after his return.

The parties will provide the Court with a brief on this point, in time for it to consider and make a ruling before this gentleman testifies.

The point was also raised at this hearing, by the plaintiffs, that they were concerned that the defendants were going to try to bring out from this Commander that he had made a protest to the powers that be, concerning the investigation made and wanted another investigation made; is that what you're concerned about?

Mr. Partington: Yes.

(p. 14) The Court: The Court was assured at pretrial conference that the parties did not intend to pursue this kind of inquiry with him, and the Court agrees on the basis that such is irrelevant and would not be proper.

Mr. Womack: Just so the Court will be fully advised, Mrs. Knowlton also signed one of those letters—

The Court: How much of this do you want on the record?

Mr. Womack: It need not be on the record, as far as I'm concerned.

The Court: Let's just put rulings on the record.

(Discussion held off the record.)

The Court: Respecting a report called Mishap Report, the Navy or the powers that be, under the Freedom Act, would not give anyone access to it, and the Court is advised under a March of 1984 Supreme Court opinion, this Court's orders in the past requiring such to be done were wrong, so that they couldn't get the report.

There was apparently some testimony or evidence to the effect that one of these plaintiffs had been given an opportunity to read it or to use it.

It is the Court's ruling at this conference that unless the original of that report could be produced and found to qualify under the Rules of Evidence, nobody can (p. 15) use the report or a copy of it, and any reference to it would be improper, because there is nothing that is relevant about somebody having just seen it.

(Discussion held off the record.)

Mr. Harrell: When you were delineating which parts of the opinions were not to be included, you had previously indicated that it was a possibility on number six, but I believe when you were setting forth your discussion that she took down, you did not allude to paragraph six. I wanted to be sure that that was covered.

The Court: Paragraph six is not admissible.

Mr. Harrell: That's correct. That's all I wanted, Judge.

(Discussion held off the record.)

Mr. Gaines: I'd like to have the record show that the Court ruled at this hearing today that the plaintiffs would be permitted to introduce evidence showing discussions about the necessity for the design and the adoption of the design of an emergency power lever which was not installed until after this crash occurred, over the objection of the defendants that this constitutes a remedial action that occurred after the event.

The Court: The evidence is admissible if it ties into a defect in design. All of this is admissible only for the

purpose of showing that there was a defect in (p. 16) design that was in the plane when the plane was sold. It couldn't be admitted for any other purpose. A measure taken after an accident would not, by itself, be admissible. Is there any argument with you about that one?

Mr. Partington: No. I think Rule 407 is the one we're talking about is after the accident. They're simply trying to push that rule back to before the accident.

The Court: That would go out. But if this evidence points out, as I thought the pitch on it was, a defect that was in existence at the time the ship was sold or goes into a negligent condition existing in design at the time the said ship was sold, then it's admissible and he can come forward with it.

Mr. Gaines: And we do not have to make on the record all the objections to all these questions that are going to be asked of various witnesses—

The Court: You mean as far as relevance is concerned?

Mr. Gaines: As far as this point is concerned.

The Court: You would want to object at trial that this was not relevant.

Mr. Toothman: Irrelevant and a time predicate that—

The Court: I don't know on the objections on the time predicate. There might be other reasons why you (p. 17) want to object. As far as relevance is concerned, you need not make those on the record, if that's what you mean. There might be other things.

(Discussion held off the record.)

(The conference was adjourned at 4:30 p.m.)

(p. 18) CERTIFICATE OF REPORTER

Omitted

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NOS. 83-4084, 83-4085

(Title omitted in printing)

(TRIAL EXCERPT)

Rainey - Direct

(p. 5-60) JOHN C. RAINEY, DEFENDANTS' ADVERSE WITNESS, SWORN
DIRECT EXAMINATION

BY. MR. TOOTHMAN:

Q Good morning, Mr. Rainey.

A Good morning, sir.

Q Mr. Rainey, for simplification of address, as least when I was in the Navy, I think it was proper protocol, all officers below the rank of full commander were addressed as Mister. It that still done? Or Ms. or Mrs., depending on sex.

A It's a matter of interpretation. I am normally addressed as work as Commander Rainey, but since I'm here in a civilian capacity, Mister will be find.

Q When I'm referring to Mrs. Rainey, since there are two of you, I'll say Mr. and Mrs. so we'll know who we're talking about.

I want to cover a few points with you, sir. The first point I want to cover, Mr. Rainey, is the relationship of the instructor pilot to the student when you take a plane

up. In this case, Mrs. Rainey was the instructor pilot, was she not?

A Yes, sir.

Q And Mr. Knowlton was the student?

A Yes, sir.

Q Do you know whether or not Mrs. Rainey was the (p. 5-61) primary pilot for Mr. Knowlton; that is, the one that would be primarily responsible for him?

A It's my understanding that that changed. Initially, I understand that Ensign Knowlton had been assigned a different instructor who went on leave after two flights and following that instructor departing on leave, my wife was assigned as his primary instructor.

Q This would be the second flight where she had been his primary instructor?

A That's what I was told.

Q It was his fourth flight?

A As far as I know, yes, sir.

Q When you go out on an instructional flight, the student cannot sign out for the aircraft, can he?

A He can on a solo; he would not on a dual flight.

Q So Mrs. Rainey would have had to have signed out for the aircraft?

A Yes, sir.

Q She takes them out as her student for that particular flight?

A Yes, sir.

Q If she doesn't already know the young man in this case from prior experience or limited experience, it's her obligation to get to know him, emotionally, and get some grasp of his basic knowledge before she takes him up; (p. 5-62) isn't that so?

A It's so, within the limits that are available. Ordinarily, you would talk to them prior, possibly look over his training record, if it was available.

Q Ask him a few questions to see where his parameters of efficiency lay; wouldn't that be a routine thing to do?

A You might put it that way. I don't know that he would be an adequate judge of where his proficiency lay.

Q The purpose of my question is that Mrs. Rainey is supposed to ask the questions to find out where his proficiency level it?

A She might ask what he was having problems with on previous hops, sir.

Q Now they go out and get up in the airplane and they're on a flight. Isn't her obligation to overlook everything he does and monitor everything he does, as he does it, when he's in control?

A Yes, sir.

Q And isn't it her duty, if he's doing something wrong, to either correct it by telling him how to correct it or, if there's not enough time to tell him, to just do it herself, take control?

A Not necessarily. It depends on where that was taking place in the flight and what the instructional objective was.

(p. 5-63) Q Yes, sir, that's what I mean. It depends on how extreme the situation is. If there's enough time and energy and effort to be expended, she should teach him by telling him how to correct it; is that basically it?

A It depends, sir. You're getting into instructional technique, whether someone would interrupt a student at the point of error or let him—and destroy his train of thought or complete the manuever would be up to the instructor, however they chose to handle it.

Q But once the instructor decided that it's too late to tell him, not enough time to tell him, then she's to take control and do it herself, isn't she?

A Depending on what the error is, yes, sir.

Q I want to go to another subject now, sir. I want to get a brief resume of your experience as a pilot and hers. Let's start with you. You graduated from the Academy in '72, I believe?

A Yes, sir.

Q You went to flight training in March of '73; is that correct?

A Yes, sir.

Q Incidentally—Mrs. Rainey coincidentally started her flight training at the same time you did?

A Yes, sir, we were in the same beginning class.

Q She was a graduate of Whittier College with a (p. 5-64) Bachelor of Arts degree?

A Yes, sir.

Q You were both regular Navy at the time?

A Yes, sir.

Q You completed your flight training, both of you, in May of 1974?

A No, sir. My wife got her wings on the 22nd of February in '74; I got mine somewhere around the 15th or 16th of May, '74.

Q She finished a little ahead of you?

A Yes, sir.

Q Had she had prior flight training?

A No, sir.

Q In May of '74, you were assigned to a P3 training squadron or group at Moffett Field, California?

A That is correct.

Q And she also went to the same unit?

A No, sir. She went to her squadron at Alameda, VR-30, Fleet Logistics Transport Squadron 30 at Alameda, California.

Q You both went to California?

A Yes, sir, we both went to the Bay area.

Q From November '74 to '77, you were with Patrol Squadron 46?

A Yes, sir.

(p. 5-65) Q Flying what?

A P3 Bravos for the first two years and the last year we got P3 Charlie Updates.

Q And you wife was flying what?

A She flew C-1's, T-39's and I think the last year we were there she flew the DC-9.

Q In November of '77, you were reassigned back to Whiting Field—

A Yes, sir.

Q —here in Florida?

A Yes, sir.

Q Was this for the purpose of coming back as a pilot instructor?

A That's correct.

Q What did your wife do at that time?

A At that time, my wife resigned from active duty, became a civilian.

Q She resigned her regular commission and got a commission in the Reserves?

A Yes, sir.

The Court: When was this she did this?

The Witness: We came down here in November of '77.

The Court: At the time of this accident, you were not on active duty?

(p. 5-66) The Witness: Yes, sir, I was. This was a previous tour at Whiting.

The Court: Go ahead.

BY MR. TOOTHMAN:

Q When did you finish your obligated service that you were obligated as a graduate of the Naval Academy?

A My obligated service from the Naval Academy would have been five years after I graduated, so the 7th of June '77.

Q All right, sir. And in '78—you also resigned from the Naval services as a regular Naval officer and went to American Lines; is that correct?

A That's correct.

Q Now, with American Airlines, you were in the initial stages of crew training and you were there for a flight engineer, were you not?

A Yes, sir.

Q At all times with American Airlines, you were a flight engineer?

A That's correct.

Q And you now have a commitment to go back to American Airlines as a flight engineer?

A I have an option to go back as a flight engineer, yes, sir.

Q Then from '78 to '81, that's the period of time we're talking about with American Airlines?

(p. 5-67) A Yes, sir. Well, no. I actually started with American Airlines, I think, the 3rd of January '79, and was laid off by them in September, October of '81.

Q When you go laid off by American Airlines, you requested the Navy to come back on active duty in the Reserves?

A Yes, sir.

Q That's how you got back on active duty in 1981?

A That's correct.

Q And in 1981 when you came back, you came to Whiting Field as an instructor pilot?

A Yes, sir.

Q That's what you had been when you left the Navy?

A That's correct.

Q Now, Mrs. Rainey came back into the Navy as a Reserve officer on active duty at what time?

A The same time I did.

Q So you both came back upon request for active duty in 1981?

A Yes, sir.

Q Both came back as instructor pilots?

A Yes, sir.

Q Now, instructor pilot is a normal—rather normal assignment in the routine of a Naval Aviator?

A Not necessarily. It's a possibility. It's an option (p. 5-68) you could choose or the Navy could assign you to for shore duty. It's one of a number of options.

Q All right, sir. Now let's talk about the—the next subject I want to address is the command arrangement

here that you and Mrs. Rainey were in. At Whiting, you were both in Training Wing Five; is that correct?

A That's correct.

Q Training Wing Five was skippered by Captain Jack Smith?

A That's correct.

Q And under Training Wing Five, there were three training squadrons; is that right?

A There are five training squadrons. There were three fixed wings and two helicopter.

Q I'm sorry. Three fixed wing training squadrons?

A Yes, sir.

Q That's two helicopter and three fixed wing?

A That's correct.

Q Mrs. Rainey was assigned to Squadron Three?

A Yes, sir.

Q And at all times we're talking about here, she was in Squadron Three; is that right?

A That's correct.

Q You were assigned to Squadron Two?

A Correct.

(p. 5-69) Q And at all times through the accident, you were in Squadron Two?

A Yes, sir.

Q Mrs. Rainey, in Squadron Three, has as her skipper Lieutenant Colonel Habermacher of the Marine Corps?

A In the latter half of the time she was in the squadron. Initially she had Commander John Healy and he was relieved in May of '82.

Q At the time of the accident, her skipper was Lieutenant Colonel Habermacher?

A That's correct.

Q Now, also in her squadron was Lieutenant Blake, was there not?

A There—Lieutenant Commander Blake was in her squadron. I don't know if there was a Lieutenant Blake.

Q I'm sorry, I meant Lieutenant Commander Blake. I'm sorry.

A Yes, sir.

Q Now, on the day of the accident, Blake was in the pattern, he was one of these planes in the pattern, wasn't he?

A That's what I've been told, yes, sir.

Q Lieutenant Colonel Habermacher was one of them in the pattern?

A I was told that. I was not there.

(p. 5-70) The Court: You are going into matters that he doesn't know directly himself. I don't know why you're going into it this way.

Mr. Toothman: He has stated in his letter—

The Court: Yes, but it comes from something he was told.

Mr. Toothman: Well, it's an admission. I'll tie it up.

The Court: Go ahead, sir.

BY MR. TOOTHMAN:

Q In your squadron, you have, in addition to yourself, Lieutenant Hanzell?

A Yes, sir.

Q Lieutenant Kolakowski?

A Yes, sir.

Q And Captain Guthrie; they were in your squadron?

A They were in my squadron, yes, sir.

Q You were senior in rank to all three of them, were you not?

A That's correct.

Q I'm finished with that aspect of my questioning. The next aspect has to do with a few questions about Lieutenant Kolakowski.

After the accident, as some period either in late '82 or early '83, in your squadron, Lieutenant (p. 5-71) Kolakowski came under your direct command, did he not?

A Command? He worked for me. I don't know if I'd call it command.

Q All right. He was one of the officers working directly under you in the carrying out of your duties?

A Yes, sir.

Q In February or March of 1983, you had this lawsuit pending, did you not?

A Define pending, sir.

Q Well, it had been filed and it was moving along.

A February or March of '83, sir?

Q Of '83.

A I don't believe so, sir.

Q Was it that you were thinking about it, then?

A I was thinking about it. I don't think it had been filed.

Q Let's say you were thinking about it.

A Yes, sir.

Q In February or March of '83, as one of your duties in the supervision of Lieutenant Kolakowski, you filled out his fitness report, did you not?

A I filled out a rough fitness report that I submitted to the operations officer, who then sent it to the commanding officer. The commanding officer is the one who does fitness reports on all officers.

(p. 5-72) Q The skipper signs the fitness report on every officer in his unit, does he not?

A Yes, sir.

Q However, he delegates to those under him, certain officers, the responsibility of giving to him a suggested draft of a fitness report for his signature?

A That's correct.

Q Insofar as Lieutenant Kolakowski, you were the one designated to submit the fitness report on Lieutenant Kolakowski?

A I submitted the initial draft, yes, sir.

Q And about three months after that, Lieutenant Kolakowski gave his deposition in this case, didn't he?

A I don't know the date of his deposition, sir.

Q I want you to assume, sir, that Lieutenant Kolakowski was deposed on June the 27th of 1983, at Milton, Florida.

A Okay.

Q That's the date.

A Yes, sir.

Q You sat through that deposition, didn't you?

A Yes, sir, I was there.

Q And at that time, you were stationed out at NAS Pensacola weren't you?

A That's correct.

Q Incidentally, you gave Lieutenant Kolakowski a (p. 5-73) good fitness report, didn't you?

A Yes, sir. He was a good officer.

Q I want to go to another subject, please, sir. Your relationship with Captain Guthrie. You have agreed that Captain Guthrie was in your squadron?

A Yes, sir, he was.

Q You will agree that this accident happened on July the 13th, 1982?

A Yes, sir.

Q Now, you've heard your skipper, Commander Shields, on tape here, videotape, say that he went flying with you; remember? Remember that testimony of Commander Shields?

A Yes, sir.

Q That flight with you took place on August 2nd of 1982, did it not?

A I don't know. I'd have to check my log book. If you're looking it up, I will take your word for it, sir.

Q I'll give you something quicker.

The Court: Can you speak up a little bit louder? I believe they're having a little trouble hearing you over there.

The Witness: Yes, sir.

BY MR. TOOTHMAN:

Q Do you have a log book or would you want to read your (p. 5-74) deposition to get that date?

A I do not have a log book with me. There is a log book at NAS Pensacola that documents when I flew.

Mr. Toothman: Can we stipulate it was August 2nd?

Mr. Larry: Sure.

BY MR. TOOTHMAN:

Q It's stipulated—

A Yes, sir, that's fine.

Q Now on August 2nd when you took that flight with your skipper, Commander Shields, Commander Shields said on his deposition that he had read the written—initial written statement given by Captain Guthrie and that it didn't provide any light on what might have happened.

Commander Shields also said, "I understand he later amended it." Now, Mr. Hall, when he testified yesterday, said that he had seen both statements of Guthrie's.

Mr. Larry: Your Honor, I don't believe that's correct. I object to that testimony by Mr. Toothman. I believe he said he saw one statement and one desposition.

The Court: I don't recall what it was, either.

Mr. Toothman: I'll rely on the jury's recollection.

BY MR. TOOTHMAN:

Q My question to you, sir, is did you see both statements?

(p. 5-75) A I only saw one statement, sir.

Q That was the second statement?

A It's the only one I saw.

Q Well, it was the second statement—

The Court: Do you know w ether it was the first or second statement that you saw?

The Witness: I saw a statement.

The Court: You saw a statement?

The Witness: I don't know if it was the first or the second one.

BY MR. TOOTHMAN:

Q All right, sir. Let's see if we can figure out if it was the first or second one. Commander Shields saw the first one prior to August 2nd—

THE COURT: Are you asking him whether he—

Mr. Curtis: Your Honor, he has no evidence—he doesn't know if there were two and there's no evidence before the Court that there were two.

The Court: Of course not. I don't know how he would know when Commander Shields saw it. Have you got the statement? If you've got a copy of the statement, show it to him and see if that was the one he saw. Will that get to it, Mr. Toothman?

Mr. Toothman: I've got the second one.

The Court: Is that the one you think he saw?

(p. 5-76) Mr. Toothman: Yes.

The Court: Well, show it to him and see if that was the one he saw.

(Document handed to witness.)

The Witness: That is the statement that I saw.

Mr. Toothman: Tell the jury the date on the statement.

The Witness: 24 September 1982.

The Court: Is this the statement that you saw, sir?

The Witness: Yes, sir.

The Court: All right. Go ahead.

BY MR. TOOTHMAN:

Q All right, sir. So that after the Shields' flight, this statement was made; isn't that true, sir?

A That's correct, yes, sir.

Q And you were present when this statement was made, weren't you?

A He wrote that statement in my presence, yes, sir.

Q And you found it so important that you helped him carry it over and give it to Commander Morgan, didn't you?

A. That is correct.

Q And this is the statement that talks about closing distances, isn't it?

(p. 5-77) A Again, that's the only statement I have seen. Yes, that does talk about the closing distances.

Q And in between those times, you have talked to—in between the time of the accident and the time of this statement on September 24th, you had talked to Captain Guthrie several times, had you not?

A That is correct.

Q All right, sir. Next subject. This has to do with a letter you wrote. It is undated and I would like to establish a date with you.

You wrote a letter to Lieutenant Commander Morgan who was—do you know who Lieutenant Commander Morgan is?

A Yes, sir.

Q His squadron is what squadron?

A VT-3.

Q That is your squadron?

A No, sir.

Q You wrote a letter to him which was undated, wherein you recited what you believed to be certain facts about the accident; isn't that so?

A I believe it's more correct to say I cited things that I had been told about the accident. I was not there, so I don't know facts about it.

Q You adopted them as your statements, didn't you?

(p. 5-78) A I wrote that letter, yes, sir.

Q I want to get the date of that letter. Do you remember the date of that letter?

A No, sir, I do not.

Q Do you remember that you attached to your letter a statement from Ensign Arnett?

A To one of my letters, yes, sir, I did.

Q All right, sir. I'll show the letter.

(Handing document to witness.)

Q This is your letter. You enclosed a statement of Ensign Arnett?

A Yes, sir.

Q The statement of Ensign Arnett is dated December, is it not?

A I'll have to check.

Q It's hard to read, but I think that's what it is.

A Where are you?

Q Up at the top.

A I can't really read that. I'll take your word that it's December.

Q Did you send that letter in shortly after you got that statement from Ensign Arnett?

A Fairly shortly thereafter, I would assume, yes, sir.

Q All right, sir. So then for the purposes of my questions, can we agree that this letter was written the (p. 5-79) end of 1982 or early '83?

A Yes, sir.

Q I think maybe you better have this letter to look at when I ask you my next questions.

A Yes, sir.

Q Now, by this time, by the time you've written this letter, you have talked to Lieutenant Kolakowski, Lieutenant Colonel Habermacher, Ensign Arnett, and Captain Guthrie several times, Hanzell, who was a friend of yours, and Colley? You discussed this case with all of them, hadn't you?

A I had not discussed the case with Ensign Arnett.

Q Let me just check something here, sir. You talked with Ensign Arnett before he left for Corpus Christi. When did he do that?

A The date that he made this statement, I asked him was he there and would he be willing to make a statement. I did not discuss what he saw or what his testimony would be.

Q All right, sir. Please refer to the letter.

A Yes, sir.

Q Paragraph two, did you not state that Lieutenant Commander Rainey attempted to cancel the flight at approximately 0840?

A That is what I was told.

(p. 5-80) Q That's what you said?

A That's what I wrote, yes, sir.

Q Now, at the time of 0840 when she attempted to cancel the flight, her request was denied, was it not?

A Personally, I do not know that. That's what I was told.

Q Yes, sir. All these things, you weren't there?

A That's right.

Q But you talked to all these people and you put these down as facts, didn't you?

A No, sir, I did not put them down as facts.

Q You didn't qualify them in any way, did you?

A I stated in the last paragraph that I submit the above for consideration, in order to present aspects that may not have been covered. I don't know that I presented them as being factual.

The Court: Didn't you submit it because you believed them to be true?

The Witness: I had been told them, sir.

The Court: Let me ask you this question. Unless you believed them to be true, would you have submitted them?

The Witness: No, sir, I would not.

The Court: Then would it be fair to say that you submitted this because while you had been told these (p. 5-81) things, you believed them to be true?

The Witness: Yes, sir.

The Court: Go ahead, Mr. Toothman.

BY MR. TOOTHMAN:

Q When this request to cancel the flight at 0840 was denied to Mrs. Rainey, she reacted in an uncharacteristically heated and disgusted manner, didn't she?

A Did I say heated?

Q That's the way—my thing is a little blurred. It's the top of page two of your letter, first line.

A I can't read that.

Q All right, sir. You can read uncharacteristically something and disgusted manner, can't you?

A Yes, sir.

Q Now, isn't it true, sir, that you put forth the reasons she tried to cancel this flight was that Ensign Knowlton had been up since 4:30 that morning, as one of the reasons?

A Yes, sir.

Q And that they had had one airplane cancel and that they had to wait for this second airplane, and that Ensign Knowlton had an examination at 12:00 that he had to get back for and they were pushed for time?

A Yes, sir.

Q That Ensign Knowlton was tired and emotionally (p. 5-82) drained.

A I think he said he could possibly have been, yes, sir.

Q The first line of paragraph C, page two, that they had been exerted to unnecessary pressure, the two of them?

A I don't know that I said the two of them.

Q Well, someone was put under unnecessary pressure?

A Yes, sir, that's what I said.

Q All right. Now, go—and one more question for you, sir, maybe two. Lawyers say one and there's always three.

Go to page four of your letter, paragraph E, second half of the paragraph. Now, in this paragraph, you referred to two airplanes, 955—can we agree that that's Mrs. Rainey's airplane?

A Yes, sir.

Q And you referred to airplane number 644. Can we agree that that's Lieutenant Colonel Habermacher's airplane?

A Yes, sir.

Q Didn't you say, sir, that after Mrs. Rainey's airplane rolled wings level, that Lieutenant Colonel Habermacher's plane came into view unexpectedly at its closest point of approach, although sufficient separation still existed between the aircraft. However, the unexpected proximitely of Colonel Habermacher's plane caused one of (p. 5-83) the aircrew in Mrs. Rainey's plane to react instinctively and abruptly by initiating a hard right turn away from Colonel Habermacher's airplane?

A That's what I said, based on the information I had at that time, yes, sir.

Q And this is late December '82, early January '83, we agreed.

A Yes, sir.

Q Now, later on, you and Mrs.—you and Mrs. Knowlton both wrote a letter adopting that same point of view, didn't you?

A It's not fair to say that Mrs. Knowlton wrote the letter. I wrote the letter and submitted it to her for her approval.

Q And she signed it?

A Yes, sir.

Mr. Toothman: Thank you.

The Court: Who's next? Do any of the rest of you wish to put this witness under direct?

Mr. Harrell: I have no questions.

Mr. Gaines: No questions, Your Honor.

The Court: You may proceed with cross-examination.

CROSS-EXAMINATION

BY MR. LARRY:

Q John, the inference that Mr. Toothman tried to draw (p. 5-84) from you was that you influenced the testimony of Captain Guthrie and Ensign Arnett and Lieutenant Kolakowski. Did you do that with any one of these witnesses?

A No, sir. I—

Mr. Toothman: I object to any of his motivations for these witnesses.

The Court: You went into his knowledge of them and so forth. I assumed you were trying to establish some basis for possible bias. The objection is overruled. You opened that door a little bit.

BY MR. LARRY:

Q Did you answer the question, John?

A No, sir, I did not make any attempt to influence their statements.

Q Has Captain Guthrie ever given any statement that you know of that was in anywise inconsistent with the taped deposition that was presented here in this courtroom?

A Not that I know of, no, sir.

Q Now, sir, in your letter to Commander Morgan, when you stated that there was an assumption about a hard right turn, was there some reason why you and Commander Shields flew that maneuver three weeks after the crash?

A Yes, sir. That was based on the information that we had directly after the accident.

Q And what was your experience? Was it the same as (p. 5-85) Commander Shields related to this jury, that the aircraft would not stall with power on; was that your experience?

A Yes, sir. In all of the evolutions that we tested, regimes that we tried, the airplane would not stall with full power available.

Q One last point. In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably primary cause of this mishap was rollback?

Mr. Toothman: I would object to this, Your Honor. Probable cause is an opinion.

The Court: I beg your pardon?

Mr. Toothman: He's trying to get an opinion out of him now, not a fact.

The Court: Objection sustained.

Mr. Larry: Your Honor, he has had the ability—

Mr. Toothman: I object to him arguing.

Mr. Larry: May I be heard on this?

The Court: Yes, sir. Go ahead.

Mr. Larry: On the basis that this letter constitutes an admission by Commander Rainey, he has been asked to answer every single question Mr. Toothman had respecting—

(p. 5-86) The Court: I don't recall going into anything except the matter about that right turn and so forth, and that's all he went into. He did express that opinion and that came in as an admission against him, I suppose, but that doesn't mean you can qualify him for the questions you are now asking. The objection is sustained.

Mr. Larry: No further questions.

Mr. Toothman: Just one redirect.

REDIRECT EXAMINATION

BY MR. TOOTHMAN:

Q You were asked by counsel if the taped deposition was the same as the statement taken. Now, it was the same as the statement of September, was it not?

A Could you clarify what you're asking? The deposition—obviously the text of the deposition is not verbatim from what the statement says.

Q But it talks about the catching up, the speed up and the meeting of the airplanes getting together—

A Yes, sir.

Q —and overtaking—

A Yes, sir.

Q That's what was said in the second statement, the September statement?

A That was what was said in the September statement. Again, that's the only statement I saw.

(p. 5-87) Q You would have no knowledge where we might find this first statement?

A No, sir, I do not.

The Court: You may step down, sir.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NOS. 83-4084, 83-4085

(Title omitted in printing)

(TRIAL EXCERPT)

* * *

(p. 7-57) AFTER MORNING RECESS

(The following proceedings were held in the courtroom outside the presence of the jury:)

The Court: Mr. Harrell, I understood you wanted me to come in without the jury because you wanted to make a proffer; is that correct?

Mr. Harrell: Your Honor, we would like to proffer the JAG report, which has been marked at BASI Exhibit 15. Of course, I recognize it will be just for identification.

The Court: There are some deletions to be made in it, if it's going to the jury.

Mr. Harrell. Judge, we have—

(p. 7-58) Mr. Partington: This is not the one you said—

Mr. Harrell: You have already ruled that you are not going to allow this whole report in, Judge, but I want to proffer it. That's the reason I wanted it outside the jury.

The Court: I said this, I think, about that report, that the only thing we really needed were the statements of fact and conclusions.

Mr. Harrell: We've got that one coming up, Judge.

The Court: However, anything attached to that report may be used by someone on examination of whoever prepared it. If he's not here to be examined, we don't need the rest of it. I think my rule went to whether it was needed.

Mr. Harrell: I understand, Judge. I just wanted to proffer it for the record. This is for identification. This is not in evidence.

The Court: All right, sir. Let it be marked for identification only—

Mr. Harrell: As BASI 15.

The Court: Under Rule 403, if it has any relevance, it's outweighed by prejudice or an undue waste of time.

Mr. Harrell: I understand, Judge.

(p. 7-59) The Court: And had the man that prepared that report been brought here, you could use it to cross-examine him. I suppose, Mr. Partington, if there's anything in there that contradicts the statement, we still could—

Mr. Partington: The only thing that we want to offer in is the maintenance record which he actually examined and attached to his report in connection with the statement he made about the maintenance.

The Court: I think, to that extent, it may come in.

Mr. Harrell: Judge, is this from the JAG report?

Mr. Partington: Yes. Those are actual copies of records from the JAG report.

Mr. Harrell: It's all right, Judge, but you were only going to let in the findings and the opinions that Mr. Womack has as a Beech exhibit, a revised exhibit—

The Court: No, Mr. Harrell, I did not so state. If I left that impression, I'm sorry. My only thought on it is this, that we need only that short statement that was in evidence. If, however, there are matters in that statement that any party, you or anybody, wishes to use to impeach the accuracy of the statement made about a matter that's in that record, then the party is at liberty to use it to that extent.

Mr. Harrell: Of course, we want to object to (p. 7-60) this, Judge, and make the record very clear that we object to the proffered JAG report as edited by Mr. Partington. It was my clear understanding that Mr. Womack had gone over with Mr. Partington—if Your Honor will remember—even to the point of adding Morgan's name because Mr. Partington said they wanted the name at the end of this exhibit.

Mr. Partington: This exhibit is identical and it is, in fact, a Xerox copy of what Mr. Womack prepared with Mr. Morgan's name. All I'm saying is—all I'm talking about, Judge, is these exhibits which go to his statement.

The Court: That's what I understood, too. This obviously has to be a correct and true copy of those pages, and certainly I can trust you attorneys to do that. I don't know what your objection is.

Mr. Partington: We've done that.

Mr. Harrell: Judge, you are misunderstanding me.

The Court: I must be.

Mr. Harrell: Let me try one more time.

The Court: All right, sir.

Mr. Harrell: It was my distinct understanding, and even after the second meeting, that the findings of fact and the opinions which are reflected would be what the Court was going to allow; and after we had had a conference, Mr. Partington said, "I want Mr. Morgan's name (p. 7-61) to appear at the bottom," and we went back and put his name at the bottom, just to satisfy Mr. Partington. It's my understanding that is what the Court had said it would allow into evidence.

The Court: I agree, and that's what I'm still allowing in evidence. I've gone beyond it here to say that if he wants to use some portion of the background of that report to try to impeach any factual finding in that report, he may do so.

Mr. Partington: I notice that exhibit does not have, as we agreed, on the bottom of it the man's name.

Mr. Womack: I will stipulate that you can write it on. This was being photographed before I knew you wanted to add it. This was edited according to the Court's ruling.

The Court: You've done it this way just as a convenience so that the jury can see it, I guess.

What is all the argument about? I don't understand it. Is my ruling clear to you now?

Mr. Partington: Yes, sir, and that's all I have, these little sheets—

The Court: That's just an exhibit for clarification, so that the jury can see it, I guess.

Mr. Toothman: These two do not agree.

The Court: I beg your pardon?

(p. 7-62) Mr. Toothman: These two do not agree. In his, he has reference to the fact that the emergency lever had not been installed.

The Court: What did you copy it from? Now I certainly don't understand. I know the pages that were before me in conference and if there's any deviation from those pages, I don't understand. I don't know why there is.

Mr. Toothman: There is no deviation.

Mr. Womack: We edited this, Your Honor—

The Court: He says he's got something that's different.

Mr. Partington: Wait a minute, Judge. May I please speak?

The Court: Yes, sir.

Mr. Partington: What I hold in my hand, Judge, is a true, accurate and correct copy of what was provided to me by Beech, that they were going to offer in on the findings of fact. Now, that's all I'm holding. They now have announced—and I'm not quibbling with it or quarreling with it, I simply want you to understand that I'm not trying to do something wrong here, Judge—

The Court: I know I had something in front of me and that's what is supposed to go to the jury. Now let's back up and see what's different.

(p. 7-63) Mr. Toothman: All he's got to do is cut out paragraph 8.

The Court: Let's see what this is.

Mr. Partington: I'm not offering this. May I approach the bench, sir?

The Court: Yes.

Mr. Partington: We're going to offer these documents here as an exhibit. Those are the findings that we have agreed with Beech to go in; okay?

Mr. Toothman: Except paragraph 8.

Mr. Partington: Now, since they prepared those findings, they have deleted from the findings paragraphs 8 and 9. If you would, please read those.

The Court: You have deleted paragraphs 8 and 9.

Mr. Toothman: Yes, sir. Paragraph 8 refers to the fact that this plane did not have, at the time, the emergency power lever we're not allowed to talk about.

Mr. Womack: I took 8 off, just cut it out.

Mr. Partington: Then you've got findings—

Mr. Curtis: Your Honor, there was never an issue that this aircraft did not have it. The issue was whether they put it on afterwards.

The Court: The issue was whether or not it could have been put on that plane or reasonably feasible.

Mr. Toothman: But that shows that it didn't have (p. 7-64) it in conformance with a Navy spec that was then in existence.

The Court: I think this is properly in evidence. It was not barred by my ruling. You came along and you went into a feasibility stipulation to keep the subject of a subsequent change from coming in. Since that time, we've gone into some other areas. But you were never willing to stipulate that it was not only feasible, but desirable. That's the reason for that ruling there.

However, it is also a part of the fact of matters here that this plane did not have it on. That's what this says.

Mr. Toothman: But it says it didn't have it on in accordance with the specifications which had been changed by that time.

The Court: It says that although much had been written about the need for a manual fuel control, and so forth, it still is not installed. I think that factual finding can come in.

Then the next one was nine, you left that out. (Reading) I don't know why that was eliminated, either. There's no issue on it. Why did you-all leave that out?

Mr. Toothman: I don't know why, Judge.

Mr. Harrell: Let me look, Judge. I can tell you why we left it out, because I thought the Court had ruled.

(p. 7-65) The Court: Ruled what?

Mr. Harrell: That it couldn't go in.

The Court: What are you talking about, eight or nine? I m talking about nine.

Mr. Harrell: We have no objection to it. We withdraw our objection to Mr. Partington's, insofar as BASI is concerned.

Mr. Gaines: Your Honor, in view of the fact that that is going in, we would like to offer two exhibits to document the fact that a proposal was made to Beech for the incorporation of the manual fuel control back in 1979; Pratt offers these two documents to support that.

Mr. Partington: We object to that, Your Honor.

The Court: This is being allowed into evidence because it shows that there was no control on this plane in 1978. That's the thrust and the pitch of their contention.

Mr. Gaines: That is not in any way disputed, Your Honor, so there is absolutely no reason to put that in evidence with that other statement which accompanies it that goes on to say that although it's available, et cetera, et cetera.

The Court: My only complaint with that, sir, is that you come now at trial—at pre-trial, I said that this comes in. Now you come along and have revised another (p. 7-66) one. As far as I'm concerned, Mr. Partington, if they want to stipulate that it was not on there, that's fine. We'll go along with what he's got there and leave out this other part about that although much had been written, still not installed. If you want to do that and stipulate, fine.

Mr. Toothman: We'll stipulate that it was not on this airplane.

Mr. Larry: I'd like that JAG officer to be saying to the jury that it wasn't on that plane.

Mr. Gaines: The reason he would like that, Your Honor, is because that report says that it had been proposed but had not yet been adopted.

The Court: The main thing is that BASI is willing to stipulate that it was not on that plane. That answers every objection I have in my mind. We've had too much of this kind of thing going on here. I want to drop it now.

Mr. Harrell: Judge, if we get this—I would just like to renew my objection because he says he's not going to put this in—

The Court: He's going to use some of it—

Mr. Harrell: It's my understanding—

The Court: If you want to object to him using that, your objection is noted and overruled.

Mr. Harrell: I understand. I want the record (p. 7-67) to be clear that I'm objecting to his putting in just portions. The Court has ruled out the JAG manual and it was my understanding that only the findings and opinions would be—

The Court: Mr. Harrell—

Mr. Harrell: I just want that on the record. I misunderstood and I apologize.

The Court: All right, sir. You've put it on the record about four times. Let's get through putting it on the record.

Mr. Harrell: I'm through. The thing about it is, I want to be sure, because there's been a misunderstanding develop since then.

The Court: What about this nine, I don't see where that makes much difference, Mr. Partington.

Mr. Partington: I don't have any problem with that, Judge.

The Court: Let's go with what you have there, but we'll start this off somewhere by stipulating that the manual control system was not on the plane at the time it was sold and delivered to the Navy.

Mr. Womack: That's correct.

Mr. Partington: Judge, the only thing that I request is that the jury be advised that this report is a report of one man. Now, I have asked, and they were going (p. 7-68) to put on it, type on the exhibit, the name of the one man who prepared it. It isn't on there and they want me to come over there and scribble it on.

Mr. Womack: Judge, these were out being developed, but I will stipulate that they can add it anywhere—

The Court: There's no objection to stipulating and telling the jury that the parties are in agreement that this was prepared by one JAG officer and his name, is there?

Mr. Womack: Absolutely none.

Mr. Gaines: He's not a JAG officer. One officer.

Mr. Womack: I'll stipulate to that in any way you want.

The Court: Have you put this in evidence yet?

Mr. Womack: Yes, sir. The JAG report, according to your ruling, was admitted earlier. This is an enlargement that comports with your ruling.

Mr. Partington: I don't think it has been admitted.

Mr. Womack: It isn't?

Mr. Partington: No, sir.

Mr. Womack: I'm sorry.

Mr. Partington: I'm not sandbagging, I'm just—

Mr. Harrell: I want to be sure that it's in. The next thing I would want to do is get Mr. Womack—

(p. 7-69) Mr. Womack: We would offer it as a composite exhibit, Beech's next number.

The Court: We can get the jury back in, you can offer it then as an exhibit, and also at that time, put your stipulation on about this manual thing and the fact it was signed or prepared by one man.

Mr. Womack: Give me his name.

Mr. Partington: Morgan.

The Court: For record purposes, we better get the jury in.

Mr. Womack: Can I use this as an exhibit for the record and use this in argument? That's the way it ought to be.

Mr. Womack: We've got a few more exhibits, Judge, that I want to offer.

The Court: I'm not sure why we're doing all of this out of the presence of the jury. Are you ready to let the jury in?

Mr. Partington: I'm sorry, what—

The Court: This is what is going in evidence?

Mr. Partington: Yes, sir.

The Court: And use this as an enlargement of it, and so tell the jury?

Mr. Partington: Yes.

The Court: And we're also going to tell the (p. 7-70) jury that this report was prepared by one man whose name is so and so.

Mr. Partington: That's right.

The Court: And you're also going to make the stipulation before the jury that this plane that was sold to the Navy had no—

Mr. Partington: Didn't have it on at the time of the crash.

The Court: Had no manual backup system for fuel control at the time of the sale.

Mr. Womack: Yes, sir.

Mr. Partington: Yes, sir.

The Court: Call the jury back in.

(The following proceedings were held in the courtroom in the presence of the jury:)

The Court: You may proceed, sir.

Mr. Womack: Yes, Your Honor. May it please the Court, ladies and gentlemen of the jury, we have stipulated and agreed and His Honor has approved the statement that at the time the aircraft was delivered to the Navy, it did not have a manual override system in it.

We have offered further as an exhibit certain findings of fact and opinions from the JAG report, which His Honor has allowed into evidence as Beech's next exhibit. This was prepared and signed by an officer W. C. (p. 7-71) Morgan, Jr.

His Honor has allowed us to make a blowup of these so it will be a little easier for you to read it.

The Court: Just to keep the record straight, there is an objection to part of this coming in evidence, was there not?

Mr. Partington: I believe those matters were resolved.

The Court: As long as the record is clear, that's all right. Let it be received in evidence. It would be your exhibit, I guess, would it not, Mr. Womack?

Mr. Womack: Yes, sir, Exhibit 37. I think all of the rest of mine are in.

• • •

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NOS. 83-4084, 83-4085

(Caption omitted in printing)

(EDITED JAG REPORT)

JAG REPORT

Findings of Fact

1. At approximately 1020 local on 13 July 1982, a U.S. Navy T-34C aircraft, bureau number 160955, piloted by LCDR Barbara A. Rainey crashed approximately two miles Southeast of Middleton Airport near Evergreen, Alabama [enclosure (3)].

2. LCDR Barbara A. Rainey, 558-72-0652, USNR, reported to Training Squadron THREE on 16 November 1981 [enclosure (4)]. At the time of the accident LCDR Rainey was fully NATOPS qualified (Naval Air Training and Operation Procedures Standardization Program) and Instrument qualified [enclosure (5)] as well as being a qualified familiarization instructor [enclosure (6)]. As of 12 July 1982, LCDR Rainey had accumulated 1331 total flight hours of which 209 were logged in the T-34C aircraft. LCDR Rainey had logged 96.2 hours during the 90 days preceding the accident [enclosure (7)]. LCDR Rainey's Aviator's Log Book indicated no record of previous accidents or flight violations [enclosure (8)].

3. ENS Donald B. Knowlton, 548-04-6268, USNR, was on active duty and checked into Training Squadron THREE on 24 May 1982 for duty as a Student Naval Aviator [enclosure (9)]. He had an average flight grade of 2.94 and

had accumulated 4.5 hours in the T-34C aircraft [enclosure (10)].

4. LCDR Rainey was physically qualified for flight duty and was in a flight status on 13 July 1982 [enclosure (11)].

5. ENS Knowlton was physically qualified for flight duty and was in a flight status on 13 July 1982 [enclosure (12)].

6. LCDR Rainey and ENS Knowlton were scheduled to fly Familiarization Flight Four at 0645 on 13 July 1982 by Training Squadron THREE's flight schedule authorizing the flight [enclosure (13)].

7. Aircraft 160955, a T-34C, was accepted by the Navy on 26 September 1978. Inspection of the aircraft records, history, and logs revealed that all required maintenance inspections and technical directives had been complied with [enclosure (14)]. There was one outstanding discrepancy, the air-conditioning ground blower door spring was broken [enclosure (15)].

9. LCDR Rainey and ENS Knowlton were issued aircraft 160955 and LCDR Rainey signed the acceptance sheet thereby assuming the responsibility of pilot in command [enclosure (22)].

10. Review of North Whiting Tower traffic control strips for 13 July 1982 show that aircraft 160955 (3E955) departed North Whiting Field at 0915 local under VFR conditions [enclosure (23)].

☐ Beech A/C No. 37

For Identification .....

Rec'd in Evidence V

11. The weather observed indicated no conditions that would have a direct effect on the flight [enclosure (24)]. Weather in the Middleton pattern was excellent with no clouds, visibility 5 miles or more, and winds light and from the south [enclosures (25), (26), (27) and (28)].

12. At approximately 1001, 3E955 entered the pattern at Middleton Field for Runway 18. At least four approaches were flown with a minimum of two "touch and go's" completed prior to the accident [enclosure (28)].

13. At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned [enclosures (25), (27), (29), (30), (31) and (32)].

14. Upon receiving notification of a crash and seeing smoke to the southeast of Middleton Field, the crash crew immediately began transit to the crash site [enclosures (27), (28) and (29)].

15. The wreckage of 3E955 crashed into a farmer's field of cutover timber with scattered trees in the area. The area has slightly rolling hills with a small dirt road passing near the crash site [enclosure (41)].

16. 3E955 crashed on property owned by Mr. Roger Warrick. Transit to the crash site required that the crash crew and other vehicles cross property owned by Mr. William W. Ward [enclosure (42)].

17. During transit to the crash site, the crash crew had difficulty in locating the wreckage due to the muddy road conditions and the circuitous route required to go around a small stream and fallen trees. Additionally, there were no current, detailed maps of the local area available to the

crash crew. 3E467, piloted by LCDR Richard E. Blake, was over the crash site and assumed on scene command and attempted to direct the crash crew to the wreckage [enclosures (27), (28), (31) and (33)].

18. ABHI R. S. Scribner stated that at approximately 1022 local, he stopped the crash truck and picked up a civilian who assisted in locating the wreckage of 3E955 [enclosure (28)].

19. LT Ted J. Choley stated that at approximately 1030 local, he received a call from LT Will Carpenter on base radio stating that there was an accident at Middleton Field enclosure (36)].

20. At 1035 local, North Whiting Field operations was notified of a possible aircraft accident near Middleton Field [enclosure (37)].

21. Upon arrival at the wreckage at 1040 local, the crash crew immediately began efforts to extinguish the fire using AFFF (lite water) and attempted to locate survivors. No response was heard to ABHI Scribner's call to crewmembers of the aircraft. The burned bodies of both pilots were noted at this time [enclosures (27), (28), (34) and (35)].

22. When all the AFFF (lite water) on the truck was depleted, the crash crew used all of the portable fire extinguishers on the truck in an attempt to put out the fire. When this failed, they resorted to shoveling dirt on the fire in an attempt to smother it [enclosures (27), (28), (31), (34) and (35)]. At 1042 local, all fires were extinguished with the exception of a magnesium fire which the crash crew was unable to put out [enclosure (38)].

23. LCDR Rainey sustained a lethal neck injury at impact but bodily functions continued for an undetermined period [enclosures (52) and (55)].

24. ENS Knowlton was killed instantly due to massive head injuries sustained at impact [enclosures (52) and (56)].

25. At some undetermined point in the crash sequence, the rotary buckle holding the shoulder straps of the from cockpit harness failed [enclosure (50)].

26. At some point during the flight or the subsequent crash, a LPA (life preserver assembly) inflation lever was moved to the activated position [enclosure (51)].

27. At the time of impact, the engine of 3E955 was operating but was operating at reduced power [enclosure (48)].

28. At 1050 local, HT-18 launched aircraft 171 as a SAR (search and rescue) mission to Middleton Field [enclosure (39)]. The aircraft arrived at the crash site at 1125 local and assumed on scene command from 3E467. 3E467 was relieved from communications relay duties at 1130 local [enclosure (33)].

29. Upon landing at the site, the crew of aircraft 171 was informed that there were no survivors [enclosures (43), (44) and (45)].

30. At 1050 local, HC-16 was notified by phone of an aircraft accident near Middleton Field. At 1105 local, a UH-1N launched and proceeded to the crash site, arriving there at 1150 local. Upon landing, HC-16 was requested to transport the bodies of the victims to NARMC (Naval Aerospace Regional Medical Center). The remains of the pilots were removed from the wreckage, placed in body

bags, and moved to the helicopter. Takeoff from the crash site was at 1430 local and arrival at NARM was at 1515 local. The remains were taken from the helicopter and placed in an ambulance for transportation to the hospital [enclosure (40)].

31. An Engineering Investigation was conducted on the engine of aircraft 160955 by the Naval Air Rework Facility, NAS Pensacola, Florida [enclosure (48)].

Opinions

1. Examination of the findings of fact, aircraft history and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that the LCDR Rainey or ENS Knowlton were not physically, sociologically, or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure to ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

5. Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground.

7. The most probable cause of the accident was the pilots failure to maintain proper interval.

W. C. MORGAN, JR.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN C. RAINEY, Individually, and
as Personal Representative of the
Estate of BARBARA A. RAINEY,

Plaintiff,

vs. PCA 83-4084

BEECH AIRCRAFT CORPORATION, et al.,

Defendants.

———————————————/

RONDI M. KNOWLTON, Individually, and
as Personal Representative of the
Estate of DONALD BRUCE KNOWLTON,

Plaintiff,

vs. PCA 83-4085

BEECH AIRCRAFT CORPORATION, et al.,

Defendants.

———————————————/

VERDICT

We, the jury, return the following verdict:

1. Was the Fuel Control System in the T-34C involved in this case defective by reason of its design and, if so, was such defect a legal cause of the deaths of Barbara A. Rainey and Donald Bruce Knowlton?

——— YES —✓— NO

2. Was there negligence on the part of Beech Aircraft which was a legal cause of the deaths of Barbara A. Rainey and Donald Bruce Knowlton?

——— YES —✓— NO

3. Was there negligence on the part of Pratt & Whitney which was a legal cause of the deaths of Barbara A. Rainey and Donald Bruce Knowlton?

——— YES —✓— NO

4. Was there negligence on the part of Beech Aerospace (BASI) which was a legal cause of the deaths of Barbara A. Rainey and Donald Bruce Knowlton?

——— YES —✓— NO

If all your answers so far are NO, your verdict is for the defendants and you should not proceed further except to date and sign this verdict and return it to the courtroom. If your answer to any question so far is YES, please continue.

5. Was there negligence on the part of Barbara A. Rainey which was a legal cause of her death?

——— YES ——— NO

If your answer to question 5 is NO do not answer question 6.

6. State the percentage of any responsibility that you charge to:

Beech Aircraft Corporation
[fill in only if you answered
YES to questions 1 or 2] ———%

Beech Aerospace Services, Inc. (BASI) ———%
[fill in only if you answered
YES to question 4]

Pratt & Whitney Aircraft of Canada, Ltd.
[fill in only if you answered
YES to questions 1 or 3) ———%

Barbara A. Rainey ———%

100 %

Your answers to question 6 must total 100% and should include a zero for any party for which you answered NO to all parts of questions 1 through 5.

SO SAY WE ALL this 20th day of July, 1984.

S/
/
FOREPERSON

JUDGMENT IN A CIVIL SUIT

(Filed July 23, 1984)

UNITED STATES DISTRICT COURT	District NORTHERN FLORIDA
Case Title JOHN C. RAINEY, Individually and as Personal Representative of the Estate of BARBARA A. RAINEY V. BEECH AIRCRAFT CORPORATION, BEECH AEROSPACE SERVICES, INC., et al	Docket Number PCA 83-4084
	Name of Judge or Magistrate WINSTON E. ARNOW, Senior Judge

X Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants BEECH AIRCRAFT CORPORATION; BEECH AEROSPACE SERVICES, INC.; and PRATT AND WHITNEY AIR-

CRAFT OF CANADA, LTD. recover of the plaintiff JOHN C. RAINEY their costs of action.

Dated at Pensacola, Florida

Clerk
MARVIN S. WAITS

Date
July 23, 1984

(By) Deputy Clerk
/s/ DEBBIE BLACK

JUDGMENT IN A CIVIL CASE

(Filed July 23, 1984)

UNITED STATES DISTRICT COURT	District NORTHERN FLORIDA
Case Title RONDI M. KNOWLTON, Individually and as Personal Representative of the Estate of DONALD BRUCE KNOWLTON V. BEECH AIRCRAFT CORPORATION, BEECH AEROSPACE SERVICES, INC., et al	Docket Number PCA 83-4085 Name of Judge or Magistrate WINSTON E. ARNOW, Senior Judge

X Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants BEECH AIRCRAFT CORPORATION; BEECH AEROSPACE SERVICES, INC.; and PRATT AND WHITNEY AIRCRAFT OF CANADA, LTD. recover of the plaintiff RONDI M. KNOWLTON their costs of action.

Dated at Pensacola, Florida

Clerk
MARVIN S. WAITS

Date
July 23, 1984

(By)Deputy Clerk
/s/ DEBBIE BLACK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NOS. 83-4084, 83-4085

(Caption omitted in printing)

Letter from LCDR John C. Rainey to
LCDR W. C. Morgan, filed with the District Court
on August 1, 1984 as an attachment
to Plaintiffs' Motion for New Trial

From: LCDR John C. RAINEY, USNR, 566-86-9769/1315

To: LCDR William C. MORGAN, USN, TRARON THREE Investigating Officer for the Judge Advocate General Manual Investigation of TRARON THREE Class A Mishap 2-82 of 13 July 1982

Subj: Items for inclusion and investigation in the Judge Advocate General Manual Investigation of TRARON THREE Class A Mishap 2-82 of 13 July 1982

Encl: Witness Statement of ENS Joseph G. ARNETT

1. Enclosed is a statement by ENS Joseph G. Arnett, USN, 247-02-9002/1390 concerning the TRARON THREE Class A flight mishap of 13 July 1982. ENS Arnett was a witness to the accident that claimed the lives of LCDR Barbara A. Rainey, USNR, 558-72-0652/1315 and ENS Donald B. Knowlton, USNR, 548-04-6268/1395 but a statement was not requested from him. In addition, I wish to have included and investigated in the Judge Advocate General Manual Investigation, various items which may have had an effect upon the mishap but which might not have been uncovered by the investigation thus far. Each major item is mentioned and analyzed independent of the others. The actual sequence of events that transpired on

13 July 1982 was, in all probability, an unfortunate combination of all of these factors.

2. LCDR Rainey attempted to cancel this flight at approximately 0840 but, effectively, was not allowed to do so. The circumstances surrounding her decision were as follows:

a. The student, ENS Donald B. Knowlton, USNR, had been up since 0430. The flight event had a scheduled brief time of 0645. Aircraft 494 was issued to LCDR Rainey at 0710. A normal preflight, engine runup, and checklist completion for a FAM 4 student should require approximately forty-five minutes. Aircraft 494 was experiencing UHF radio difficulties that required either maintenance action or a replacement aircraft for the event. Evidently, no replacement aircraft was available and the aircrew was advised to bring the inoperative aircraft back and to wait for another airplane to be issued. As LCDR Rainey and ENS Knowlton were awaiting a replacement aircraft, LCDR Rainey was advised that ENS Knowlton was scheduled for a mandatory ground school examination at 1200. Assuming a normal three hour time frame for an entire early stage familiarization flight (excluding debrief), LCDR Rainey correctly surmised that inadequate time remained to conduct the flight in its entirety and provide a meaningful debrief and still allow enough time for ENS Knowlton to attend his test. This, coupled with the fact that it was raining heavily at the airfield, that the student was tired and probably emotionally drained due to the elapsed time without flying, and that LCDR Rainey had another scheduled flight event at 1015, dictated that the prudent course of action would have been

to cancel ENS Knowlton's flight and to pick up the next student at his scheduled brief time.

b. At approximately 0840, LCDR Rainey was overheard by CAPT Guthrie, USMC, 545-76-7641/7565, in a phone conversation with LT Choley, the TRARON THREE Flight Duty Officer, attempting to cancel the flight with ENS Knowlton. On three separate occasions, LCDR Rainey requested to cancel her event. She was observed to terminate the conversation in an uncharacteristically heated and disgusted manner. Given the elapsed time from the issue of the second aircraft until the call outbound to TRARON THREE base (0845 issue, 0907 outbound call received), it is logical to assume that LCDR Rainey performed the entire preflight, checklists, and the engine runup in an effort to save time and facilitate a return prior to 1200. It might be significant to note which pilot made the outbound call, exactly what was said, and the perceived tone in which it was said.

c. This flight and the pressure exerted in this instance would appear to be unnecessary but indicative of operations existing in the squadron at that time. Instructor pilots and their students reportedly were pressured to take out flight events, under less than suitable conditions, in pursuit of student completion figures far exceeding goals established by CNATRA. At the time of this accident, TRARON THREE was presenting potential funding problems for all fixed-wing squadrons in TRAWING FIVE by exceeding its OPTAR flight hour allowances by approximately 4300 hours and its Pilot Training Rate by approximately sixty students.

3. Emphasis on possible excessive and inappropriate trim settings introduced by ENS Knowlton is not warranted. The known sequence of events, witness testimony, and real evidence do not support such a theory:

a. 3E955 entered the touch and go pattern for runway 18 at Middleton OLF at 0959. Familiarization syllabus flight four includes the introduction of full flap approaches and full flap landings. Introduce is defined by the T-34C Flight Training Instruction as:

> "Instructor: At his/her option, may perform the maneuver with accompanying description or may coach the student through the maneuver without demonstration."

3E955 made four passes at the runway prior to the mishap. The first two passes resulted in wave-offs and the last two were satisfactory in terms of approach path and touchdown point.

b. It is most probable to assume, that following two unsuccessful attempts by the Student Naval Aviator to land the aircraft, LCDR Rainey demonstrated proper full flap approach and landing technique on the third pass. It is also most likely to assume, (based on past discussions between LCDR Rainey and myself concerning instruction technique to be employed when a student was experiencing difficulty with a particular maneuver), that the Instructor Pilot flew the aircraft on the fourth pass with the student accompanying the Instructor Pilot on the controls to get a better feel for proper corrections. To assume that a student, apprehensive following two missed approaches, could land the aircraft by himself "in the box" is not logical.

c. It must be assumed that the Instructor Pilot would have relinquished control of the aircraft in a condition

of proper trim for the given aircraft configuration and power setting. For the one approach that ENS Knowlton could have possibly flown the airplane (the fourth pass), it is extremely improbable to suggest that he would have imparted full nose up trim upon the aircraft. Early stage familiarization students typically trim the aircraft only at two positions in the landing pattern, if at all. These two positions are when leveling off at pattern altitude (nose down, left rudder) and the 180° (abeam) position (nose up, rudder in direction of turn-in this case left). Historically, early stage familiarization students do not overtrim. One of the most difficult tasks confronted by a familiarization instructor is convincing the student to trim at all. ENS Knowlton had a history of basic airwork difficulties associated with inadequate trim.

d. A stall encountered as a result of full nose up trim would have resulted in an abrupt pitch up of the aircraft's nose. No witness testimony reports such a maneuver. The aircraft pitched down and rolled right.

e. Concluding that full nose up trim had been present but was removed during the recovery attempt by LCDR Rainey is not very probable. The short period of time from aircraft departure to impact would not have allowed trim adjustment. The primary concern of the pilot-in-command would have been to right the aircraft and get it flying again.

f. Finally, post-impact examination of the aircraft wreckage does not support this theory. The trim control cables were found to be in a neutral (or zero trim) position. The port elevator trim tab was deflected significantly downward but, since both elevator trim tabs deflect

when trim is actuated, it can not be used as the sole indication of excessive nose up trim.

4. Substantial emphasis has been placed upon the violation of pattern integrity committed by 3E955 as it turned crosswind without proper interval. Such criticism is valid. It does not, however, reflect the entire situation that existed at Middleton on 13 July 1982.

a. Between 3E955's third and fourth passes, 3E644 entered the Middleton touch and go pattern, bringing the total number of aircraft present to six. 3E644 failed to turn downwind when proper interval was attained (instead continuing straight ahead at 170 KIAS), and elongated the traffic pattern considerably, extending the pattern a minimum of an additional mile and making it extremely difficult for aircraft following him to visually acquire him and take proper interval. At the time of the accident, no crosswind call was required to alert other aircraft in the pattern of 3E644's position.

b. At the completion of the second touch and go landing, 3E955 commenced a climbout to rejoin the landing pattern. Upon reaching 300 feet AGL with the flaps retracted, a visual inspection of the normal crosswind and downwind portions of the pattern would have revealed no conflicting traffic. Statements from ENS Arnett, CAPT Guthrie, and LT Kolakowski reveal that 3E644 was extended so far upwind that it was extremely difficult, if not impossible, to see. At this point, 3E644 had not yet reentered the normal confines of the traffic pattern.

c. After about 40° of heading change by 3E955, CAPT Guthrie was able to pick up 3E644 on a very extended

downwind and informed 3E955 that they appeared to be cutting someone out. Given the difficulties encountered on the first two approaches and the fact that LCDR Rainey most probably flew the third approach, it is most likely to assume that the transmission from CAPT Guthrie was not heard by 3E955 due to ICS communication concerning the previous touch and go. It is a very common practice in the T-34C aircraft to have ICS volume louder than UHF radio volume in order to allow both occupants to converse, without interruption, in extremis situations. The side tone present during ICS transmissions dictates that both pilots will hear the ICS conversation that is taking place, regardless of which pilot is speaking. No rational instructor pilot would intentionally ignore a warning and continue on a course that is potentially dangerous to himself and others solely to test the student's awareness of his surroundings.

d. Assuming that the transmission from 3E644 was received by 3E955, a visual scan of the area of potential conflict would not have revealed an airplane or a dangerous situation. A dangerous situation did not exist due to the fact that 3E644 was still at least one half mile upwind of 3E955. Failure to acquire an aircraft reported in close proximity would have caused considerable apprehension for the pilots of 3E955. Accordingly, some maneuver would be called for to bring 3E644 into view and remove the possibility of collision.

e. 3E955 was observed to turn to the south, roughly paralleling runway heading. Such a maneuver would have provided lateral separation and, had a collision danger actually existed, provided sufficient time for 3E644 to

pass well clear to the north. Instead, when 3E955 rolled wings level on a southerly heading, 3E644 came into view unexpectedly and at its closest point of approach. Actually, sufficient separation still existed between aircraft. However, the unexpected proximity of 3E644 caused one of the aircrew in 3E955 to react instinctively and abruptly by initiating a hard right turn away from 3E644.

5. The most probable primary cause factor of this aircraft mishap is a loss of useful power (or rollback) caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit.

a. For the reasons stated in paragraph 3b above, I believe LCDR Rainey was the pilot-at-the-controls for the final touch and go. After completing the second touch and go landing, LCDR Rainey attempted to commence a normal climbout. It is most unlikely that control of the aircraft would have been passed to a FAM 4 student on the runway or at any attitude prior to flap retraction at 300 feet AGL. Based upon the observations of CAPT Guthrie (who was rapidly overtaking 3E955, with no appreciable discrepancy in climb-out flight paths, at a point when both aircraft should have been at maximum power), I believe that 3E955 began experiencing a gradual loss of effective power, or rollback, due to some form of fuel flow malfunction. If ENS Knowlton had been flying the aircraft, LCDR Rainey would have assumed control at this point. Due to the elongated pattern and poor rear cockpit visibility, a quick visual scan revealed no conflict with other aircraft in the pattern (and therefore, no immediate need for a radio transmission) and a climbing left turn back toward the field was initiated.

b. As mentioned previously in paragraph 4c, CAPT Guthrie observed the apparent conflict with 3E644 and made a transmission informing 3E955. If 3E955 was experiencing difficulty at this point, it is possible that they never heard the call from 3E949 due to ICS communication required to deal with the problem at hand. Even if 3E955 heard the transmission, CAPT Guthrie states that 955 presented no real collision danger to 644 (due to the extended nature of the pattern) and may have chosen to ignore 644 in order to deal with the malfunction.

c. I find this explanation entirely feasible due to the fact that 2E949 was both overtaking and, later, outclimbing 3E955 when both aircraft should have been climbing at maximum power and 100 KIAS. To attribute 949's closure with 955 to poor airspeed control on the part of the Student Naval Aviator is to overlook the observed poor climb performance of 955. Any reduction in airspeed without a reduction in power, due to distractions outside the aircraft, should have yielded even greater climb performance. None was noted. In fact, 3E955 never achieved pattern altitude.

d. Had the engine rolled back to minimum fuel flow prior to 3E955's attainment at least 1300 feet AGL for their geographical position in the pattern (and with no emergency power level installed to enable the aircrew to comply with SECTION V of the T-34 CNATOPS concerning loss of usable power) the only alternative left to LCDR Rainey would have been to maintain flying airspeed and maneuver to a suitable crash-landing site. From a climbing left hand turn, such a transition would have consisted of lowering the nose of the aircraft and turning, in the

shortest direction, toward the most acceptable emergency landing area. Interstat Highway 65, about one half mile to the south of 3E955's position, provided the nearest and the only reasonably attainable landing site. 3E955 commenced a right turn directly toward I-65.

e. The T-34C has a glide ratio of approximately 2NM per 100 feet of altitude at a sink rate of 500-700 FPM in a clean configuration at the prescribed airspeed of 100 KIAS. Leaving the landing gear down increases the sink rate to approximately 1000 FPM with a corresponding decrease in glide range. From an observed altitude of 500-600 feet AGL, it should not have been necessary to retract the landing gear to travel the distance to I-65. The statement of LT Ronald G. Kolakowski, USN, 215-62-9792/1310, another instructor pilot present in the pattern at Middleton OLF on 13 July 1982, reflects, almost exactly, the above sequence of events.

f. While turning toward I-65, LCDR Rainey would have been checking the engine instruments to determine the nature of the problem. Because the engine was still running (although at a significantly reduced power output), the difficulty at hand may not have been readily apparent. When finally recognized as a loss of useful power, it could not have been dealt with in accordance with the T-34C NATOPS due to the absence of the Emergency Power Lever and manual fuel control in 955. The only course of action available to LSDR Rainey would have been to feather the propeller and execute an emergency landing.

g. Before the above actions could be completed, the apparent conflict with 3E644 caused on of the aircrew to

initiative an evasive maneuver to the right. The abrupt control input and exremely low power caused the aircraft to depart in an attitude of approximately 20° nose down and 90° angle-of-bank. According to the statements of 2/LT Pierson, the student in 3E644, and LT Kolakowski, 3E955 was observed to return to an upright condition and should have been able to safely depart the Middleton pattern if maximum power had been available. Without power (and with insufficient time and altitude remaining to feather the propeller and retract the landing gear), LCDR Rainey was forced ot attempt an emergency landing to the only clear area available, a dirt road in the midst of extremely rough terrain. The aircraft impacted the ground about 200 yards short of I-65 in a slightly nose low and left wing down attitude at an airspeed of approximately 80 KIAS with an impact force of approximately twenty to twenty-five G's. Post crash analysis revealed that the engine was at low RPM and the propeller was at the low pitch stop while the throttle and propeller control were in full forward position, indicating, according to an independent analyst, that maximum power was being requested from the engine, but not received. Power available may have been limited to as low as 36-46% N1.

h. I believe that the small amount of evidence that does exist for this mishap points strongly towards a loss of available power, or rollback, caused by a fuel flow malfunction, most probably in the fuel control. In fact, a verifiable history of rollbacks in the T-34C does exist. The fact that a highly qualified instructor (with three years of experience in teaching students and instructors in the T134C landing pattern) observed a rapid closure rate

which dissipated normal touch and go interval in less than a mile can only be logically explained by a loss of power. No other explanation is possible, at maximum power, without a significantly different climbout path by 3E955. Another witness is the pattern (also an experienced CAT I Instructor Pilot) has also stated that 3E955 exhibited characteristics of an aircraft experiencing difficulty. I submit that a loss of useful power is the only cause factor for which both real evidence and witness testimony exists. If a rollback took place, all conjecture concerning failure to maintain pattern integrity and proper interval loses significance due to the aircrew's efforts to deal with an emergency situation and, in any case, omits the fact that 3E644 contributed directly, significantly, and equally to that problem. All supposition concerning trim settings or control of the aircraft (or lack thereof) is secondary to the most obvious and significant cause, the loss of useful power.

i. If a rollback occurred, LCDR Rainey had few options available due to her low altitude, particularly subsequent to the abrupt turn. The installation of the Emergency Power Lever, utilization of which is a NATOP'S SECTION V memory item for loss of useful power, would have provided LCDR Rainey another option and might have prevented this accident altogether. Since this mishap, another TRAWING FIVE aircraft experienced a rollback that resulted in a damaged airframe but, fortunately, no loss of life. Although many valid recommendations can and have been made, the foremost recommendation from the crash of 3E955 should be to assign the highest priority to the installation of the Emergency Power Lever

in all T-34C aircraft immediately before any further lives are lost.

6. The rescue efforts concerning this mishap require further investigation for the following reasons:

a. Immediately following impact, LT Kolakowski, in 2E522, was the first aircraft on the scene of the accident and attempted to assume the duties of on-scene commander. He relinquished those duties and departed the pattern, replaced by LCDR Richard E. Blake in 3E647, who then became responsible for the coordination of rescue efforts.

b. The rough and, sometimes, impassible terrain, in conjunction with the Middleton crash crew's inadequate knowledge of the area surrounding the airfield, resulted in an elapsed time of twenty-one minutes from impact to the arrival of the crash crew at the scene. The crash site was approximately 1.5 NM from the end of the duty runway. By the time the crash crew did arrive, the post-impact fire had progressed to a point where it could not be extinguished with the meager fire-fighting assets available at Middleton OLF. After exhausting the ninety seconds of extinguishing agent present on their truck, the crash crew resorted to shovelling dirt on the cockpit area in an effort to put out the fire.

c. The first notification call recorded by HC-16, the SAR unit for the Pensacola area, was received approximately 30 minutes after LCDR Blake assumed on-scene commander. HC-16 launched a UH-IN aircraft to respond to the SAR call. The crew of the SAR helo was heard, by other airborne aircraft, to request directions to Middleton OLF, an airport within their area of responsibility

which is utilized by TRAWING FIVE aircraft every weekday. They arrived at the accident scene approximately one hour and forty minutes after impact. Upon arrival, the SAR aircrew engaged in an argument, over the radio, concerning their duties involving the transportation of corpses. The discussion continued for approximately four hours after the UH-1N landed.

d. The entire SAR evolution for this accident must be considered unsatisfactory. In this instance, the victims died upon impact or shortly thereafter. The resultant implication, however, is that all TRAWING FIVE flight personnel can expect an equally unacceptable (or possibly worse, depending on crash site proximity to NAS Pensacola) SAR response.

e. The fire-fighting capability of the crash crew Middleton OLF is inadequate for all but the most favorable circumstances. If the fire has developed past initial ignition or if the post-impact attitude of the aircraft is other than upright, it must be assumed that the Middleton crash crew will be unable to rescue both occupants. The fact that the crash crew was unfamiliar with the area surrounding the field exacerbated the problem in this instance.

f. Definite procedures for the scene-of-action commander need to be developed in order to facilitate future SAR efforts and to preclude future loss of life. Presently, coordinated procedures either do not exist or have not received wide enough dissemination among TRAWING FIVE instructor pilots. The delay in notifying HC-16 of a mishap requiring SAR assistance would have been un-

acceptable and, possibly, fatal had there been critically injured survivors on the ground.

g. The response time of HC-16 dictates that a dedicated SAR aircraft, manned by a crew familiar with the TRAWING FIVE operating area, needs to be located at Whiting Field. The resulting decrease in transit time for the SAR aircraft might save lives in the future.

7. I submit the above for you consideration in order to present aspects of the incident that may not have been covered and in the interest of obtaining the most complete and objective investigation possible.

Respectfully,

/s/ John C. Rainey
JOHN C. RAINEY
LCDR USNR

Copy to:

Staff Judge Advocate General, Chief of Naval Air Training

Staff Judge Advocate General, Chief of Naval Education and Training

Investigations Division, Office of Judge Advocate General of the Navy

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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NOS. 84-3625, 84-3626

Panel Opinion of March 25, 1986

784 F.2d 1523

John C. RAINEY, Individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals,
Eleventh Circuit.

March 25, 1986.

Appeals from the United States District Court for the Northern District of Florida.

Before FAY and JOHNSON, Circuit Judges, and HOFFMAN*, District Judge.

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* Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

Barbara Ann Rainey and Donald Bruce Knowlton died on July 13, 1982 in a fiery plane crash at Middleton Field, Alabama. Their spouses, John Charles Rainey ("Rainey") and Rondi M. Knowlton ("Knowlton") sought money damages under the Florida Wrongful Death Act, Fla.Stat. §§ 768.16-.27 (1985), in district court.[1] The jury returned a verdict against Rainey and Knowlton. We hold that the trial judge committed reversible error in two evidentiary rulings and remand for a new trial.

I.

On July 13, 1982 Lieutenant Commander Barbara Ann Rainey, a flight instructor with the United States Navy, was issued a T-34C Turbo-Mentor aircraft, number 3E955, for a training exercise at Middleton Field, Alabama. Her student was Ensign Donald Bruce Knowlton. Ensign Knowlton was to practice "touch and go" landings and takeoffs.[2] There were five aircraft in the "touch and go" pattern.

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1. Rainey brought suit individually, as the personal representative of his wife's estate, and on behalf of his minor children, Cynthia Ann Rainey and Katherine Marie Rainey. Knowlton sued individually, as the personal representative of her husband's estate, and on behalf of her minor children, Ramsey Nia Knowlton and Branigan McDermott Knowlton. By order dated March 20, 1984 the two cases were consolidated "for all purposes including consolidation for trial."

2. A "touch and go" is a training exercise employed to familiarize students with takeoffs and landings. After takeoff, the student circles the airfield in an oval or racetrack pattern and then lands the aircraft. Upon landing, the student does not stop the craft, but accelerates to take off again.

Witnesses testified that Ensign Knowlton, after successfully completing four "touch and go" patterns, began "climbing out low; that is, below the standard altitude, and slow, slower than the 100 knots or 90 knots that the aircraft should have been at." Witnesses also testified that Ensign Knowlton made an early crosswind turn; this early turn prompted two radio transmissions. Captain Charles E. Guthrie, a flight instructor riding in another aircraft in the pattern, cautioned Lieutenant Commander Rainey:[3] "Aircraft turning crosswind, you're cutting somebody out." Similarly, Lieutenant Colonel David I. Habermacher, Jr., a flight instructor in the aircraft forced out of the pattern, transmitted the warning: "Aircraft turning crosswind, you're cutting us out. Heads up."

Lieutenant Commander Rainey did not verbally respond to these radio transmissions. Witnesses testified, however, that following these transmissions Lieutenant Commander Rainey's aircraft banked sharply to the right. While the threatened midair collision with Lieutenant Colonel Habermacher's aircraft was thus avoided, the aircraft piloted by Lieutenant Commander Rainey rapidly lost altitude, crashed in a wooded area two miles southeast of Middleton Field, and burned. Neither Lieutenant Commander Rainey nor Ensign Knowlton survived the crash.

On July 14, 1982 Lieutenant Colonel Habermacher directed Lieutenant Commander William C. Morgan, Jr. to

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3. It is, of course, impossible to determine whether Lieutenant Commander Rainey or Ensign Knowlton was in control of the aircraft at this time. Witnesses knowledgeable in flight instruction, however, testified that Lieutenant Commander Rainey, a trained pilot and flight instructor, would, under these circumstances, assume control over the aircraft.

conduct an informal investigation into the circumstances surrounding the crash. On September 1, 1982 Lieutenant Commander Morgan reported, in writing, his findings of fact, opinions and recommendations pursuant to the requirements established by the Judge Advocate General. Lieutenant Commander Morgan's report lists as an opinion that pilot error was "[t]he most probable cause of the accident."

Rainey and Knowlton disagree with Lieutenant Commander Morgan's opinion. In a letter written to Lieutenant Commander Morgan about the "aircraft mishap," Rainey, also a flight instructor with the United States Navy, concluded that the mishap was not the result of pilot error but more probably "caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit." According to Rainey, this malfunction prompted an inflight "power interruption" or "rollback" making it impossible for Lieutenant Commander Rainey to sustain sufficient power to maintain flight. Knowlton agreed with Rainey's conclusion and on April 15, 1983 Rainey and Knowlton filed separate suits in the United States District Court for the Northern District of Florida, alleging negligence and strict product liability causes of action. Beech Aircraft Corporation, the manufacturer of the T-34C Turbo-Mentor aircraft, Pratt and Whitney Canada, Inc., the manufacturer of the engine incorporated into the T-34C aircraft, and Beech Aerospace Services, Inc., the United States Navy's contract maintenance service for the T-34C aircraft, were named as defendants.

At trial, the only disputed issue was the cause of the fatal crash. Because both Lieutenant Commander Rainey

and Ensign Knowlton were not available to testify and because the aircraft was almost totally destroyed by fire, the parties relied heavily on opinions developed by expert witnesses. The defendants also relied on the opinions contained in the investigative report prepared by Lieutenant Commander Morgan. Pointing to Lieutenant Commander Morgan's opinion that pilot error was the most probable cause of the crash, the defendants argued that they should not be held responsible. The jury agreed.

On August 1, 1984 Rainey and Knowlton, complaining about two of the trial judge's evidentiary rulings, filed a motion for a new trial.[4] The judge denied the motion. This appeal promptly followed.

II.

The district court admitted into evidence, over Rainey and Knowlton's objection, excerpts from the investigative report prepared by Lieutenant Commander Morgan.[5]

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4. Rainey and Knowlton objected to the admissibility of several opinions contained in Lieutenant Commander Morgan's investigative report, Rainey and Knowlton also objected to the restriction of Rainey's trial testimony. These objections are now raised on appeal.

5. On March 20, 1984, at the pretrial conference, the district court ruled that Lieutenant Commander Morgan's report was trustworthy and admissible but "only on its factual findings and would not be admissible insofar as any opinions or conclusions are concerned." On July 10, 1984, the day before trial, the district court reversed in part its prior ruling. At that time, the judge decided to admit into evidence the opinions and conclusions contained in the investigative report.

In light of the court's ruling, Rainey and Knowlton requested an opportunity to review Lieutenant Commander

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On appeal, Rainey and Knowlton argue that many of the excerpts from the investigative report, specifically Lieutenant Commander Morgan's opinions, should not have been admitted into evidence because these opinions did not fall within the public records exception to the general hearsay rule.[6]

To be admissible, the excerpts from Lieutenant Commander Morgan's report must satisfy the hearsay exception for public records and reports. *See* Fed.R.Evid. Rule 803(8) provides a hearsay exception in civil actions for "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources

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Morgan's report and "leave, in the event we so decide, to call as a witness such person or persons who might not have been called at this trial, but who could present evidence concerning that conclusion [that pilot error was the "most probable cause" of the crash] and the trustworthiness of it." The district court granted the request.

6. The following opinions were admitted into evidence:

1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

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7. The most probable cause of the accident was the pilots failure to maintain proper interval.

of information or other circumstances indicate lack of trustworthiness." Lieutenant Colonel Habermacher, with authorization from the Manual of the Judge Advocate General § 0902, at 9-3 to -5, appointed Lieutenant Commander Morgan to conduct an investigation into the circumstances surrounding the aircraft accident. Lieutenant Commander Morgan's report, since it was prepared in conjunction with an authorized Judge Advocate General investigation, is a public record. Moreover, because no evidence was introduced to show that the report lacked trustworthiness, we find that the report was indeed trustworthy.[7] Thus, the

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7. The Advisory Committee on the Proposed Rules notes that Fed.R.Evid. 803(8) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." Fed.R.Evid 803(8) advisory committee note. Thus, the burden was upon Rainey and Knowlton to show that the report was inadmissible because its sources of information or other relevant circumstances indicated a lack of trustworthiness. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir.1975)). That burden was not met here.

Rainey and Knowlton argue that they were unable to meet their burden because they were surprised by the district court's ruling the day before trial admitting into evidence Lieutenant Commander Morgan's opinions. But Rainey and Knowlton knew months before the trial that the defendants would seek to admit Lieutenant Commander Morgan's report into evidence. Still, Rainey and Knowlton made no effort to attack the qualifications of Lieutenant Commander Morgan or the methodology he employed in conducting the investigation. In fact, when the trustworthiness of the report was discussed during the pretrial conference, Rainey and Knowlton admitted that there was no evidence to indicate that the report was untrustworthy.

On July 10, 1984 when the judge decided to admit the opinions into evidence, he granted Rainey and Knowlton

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factual findings contained in the report are admissible under Rule 803(8).

Cases interpreting Rule 803(8), however, disclose a difference of opinion as to the meaning of "factual findings." *Compare Complaint of American Export Lines, Inc.*, 73 F.R.D. 454, 458 (S.D.N.Y. 1977) (evaluative conclusions or opinions are not "factual findings"); *with Complaint of Paducah Towing Co.*, 692 F.2d 412, 420 (6th Cir.1982) (evaluative reports are admissible as "factual findings" if based upon circumstantial evidence) (citation omitted).[8] In deciding how to interpret "factual findings" in the context of this case, we are bound by the Fifth

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leave to review the report and, if they so chose, to present evidence concerning the trustworthiness of the opinions. Rainey and Knowlton presented no such evidence, and did not seek a continuance.

Thus, in light of the fact that there was no evidence presented to show that the report lacked trustworthiness we agree with the district court in finding that the report was trustworthy.

8. The legislative history of the Rule reveals the origins of the conflict. The House Committee on the Judiciary intended that " 'factual findings' be strictly construed and that evaluations or conclusions contained in public reports shall not be admissible under this Rule." H.R.Rep. No. 93-650, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S.Code Cong. & Ad. News 7051, 7075, 7088. On the other hand, the Senate Committee on the Judiciary took "strong exception to this limiting understanding of the application of the rule." S.Rep. No. 93-1277, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. Code Cong. & Ad.News 7051, 7064. The Senate Judiciary Committee recommended a liberal interpretation of "factual findings" so as to include "evaluative reports." *Id.* The Advisory Committee on the Proposed Rules also suggested that "factual findings" might encompass evaluative reports. *See* Fed.R.Evid. 803(8) advisory committee note.

Circuit's interpretation in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980).[9] In *Smith*, the Fifth Circuit considered the admissibility of a Coast Guard Marine Board of Investigation Report and found that the "evaluative conclusions and opinions of the Coast Guard Marine Board of Investigation contained in the report should not have been admitted into evidence." *Id.* at 222. The Fifth Circuit noted that:

> the language of Rule 803 suggests that "factual findings" defines something other than "opinions" and "diagnoses" which are admissible under Rule 803(6) when contained in the record of "a regularly conducted business activity." Rule 803(8), although similar to Rule 803(6), substitutes the term "factual findings" for "opinions" and "diagnoses." Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings.

612 F.2d at 221-22 (citations omitted). Thus, while the defendants urge us to follow "[t]he prevailing view . . . that all evaluative conclusions are within the scope of Rule 803(8)(C)," *Walker v. Fairchild Industries*, 554 F.Supp. 650, 653 (D.Nev.1982) (citations omitted); *see also Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 (W.D.Mo. 1982) ("it appears that the more expansive reading [of Rule 803(8)] is gaining favor") (citations omitted), we are not free to do so. The Fifth Circuit in *Smith* clearly launched this court's precedent in a different direction, a direction we must follow. We therefore hold that the dis-

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9. The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

trict court erred in admitting into evidence the evaluative conclusions and opinions contained in Lieutenant Commander Morgan's report.

Having concluded that the district court erred in admitting into evidence these evaluative conclusions and opinions, we must now determine whether this error was harmless. *See Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir.1980). We hold that it was not.

Several of Lieutenant Commander Morgan's opinions touched on the cause of the aircraft crash—the ultimate issue the jury was to decide. These opinions were submitted to the jury without ever having been tested by cross-examination. Moreover, the defendants were able to capitalize on the improper admission of these opinions by highlighting the opinions to the jury during closing argument. The jury returned a verdict for the defendants but the improper admission of Lieutenant Commander Morgan's opinions may have influenced this verdict. The admission of these opinions, therefore, cannot be considered harmless. The district court committed reversible error; Rainey and Knowlton must be afforded a new trial.

III.

Another issue raised by this appeal is whether the district court improperly restricted Rainey's trial testimony. A.H. Toothman, counsel for Beech Aircraft Corporation, called Rainey as an adverse witness. Rainey was questioned about the letter he had written to Lieutenant Commander Morgan about the "aircraft mishap." The questions concerned paragraphs two and four of the letter. In paragraph two, Rainey had written that before

the training exercise, his wife, Lieutenant Commander Rainey, was under "unnecessary" pressure. According to Rainey, his wife had attempted to cancel the exercise "[o]n three separate occasions," and "was observed to terminate [one] conversation in an uncharacteristically heated and disgusted manner." In paragraph four, Rainey had written that the aircraft piloted by his wife violated "pattern integrity . . . as it turned crosswind without proper interval." Rainey had also admitted that either his wife or Ensign Knowlton "react[ed] instinctively and abruptly by initiating a hard right turn, away from [the aircraft piloted by Lieutenant Colonel Habermacher]." Because these statements tended to support the defendants' theory that pilot error led to the crash, the district court, over Rainey and Knowlton's objection, permitted Mr. Toothman's inquiry.

During Rainey's cross-examination, however, the district court sustained the defendants' objection to the following question propounded by Dennis K. Larry, counsel for Rainey and Knowlton: "In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably [sic] primary cause of this mishap was rollback?" The district court did not allow the question, holding that the question improperly sought to elicit an opinion from a non-expert witness. On appeal, Rainey and Knowlton argue that the district court improperly excluded Rainey's testimony.[10] We agree.

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10. Federal Rule of Evidence 103(a)(2) cautions that error may not be predicated upon a ruling excluding evidence unless

(Continued on following page)

A district court's evidentiary rulings are discretionary and "will not be disturbed on appeal absent a clear showing of an abuse of discretion." *United States v. Russell,* 703 F.2d 1243, 1249 (11th Cir.1983) (citations omitted). Under this standard, we must conclude that the district court committed reversible error in limiting Rainey's testimony.

Federal Rule of Evidence 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 is based on the "rule of completeness," and seeks to avoid the unfairness inherent in "the misleading impression created by taking matters out of context."[11] Fed.R.Evid. 106 advisory committee note.

Here, Rainey was questioned about a letter he had written to Lieutenant Commander Morgan. The defen-

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(Continued from previous page)

"the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." *United States v. Winkle,* 587 F.2d 705, 710 (5th Cir.) (quoting Fed.R.Evid. 103(a)(2), *cert. denied,* 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979)); *see also* 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 103[03] (1985). While Rainey and Knowlton failed to make an offer of proof indicating the substance of Rainey's excluded testimony, the substance of the testimony was readily apparent from the language of the question the defendants objected to.

11. Technically, Rule 106 is limited in its application to instances when a party introduces a writing or recorded statement into evidence. Here, we find the defendants' questions concerning Rainey's letter tantamount to the introduction of the letter into evidence. We therefore apply the concerns of the Rule—fairness and completeness—to this case.

dants questioned Rainey about several statements in this letter that, in isolation, seemed to support the defendants' position that pilot error caused the crash. Mr. Larry, counsel for Rainey and Knowlton, sought to place these statements in perspective by questioning Rainey about paragraph five of the letter. In paragraph five, Rainey had concluded that "[t]he most probale [sic] primary cause factor of this aircraft mishap is a loss of useful power (or rollback) caused by some form of pneumatic sensing/fuel flow malfunction." This statement would have placed the prior statements in context and clearly rebutted the misleading impression created by the prior statements alone.

The court, therefore, erred in permitting the defendants to examine Rainey about portions of his letter while prohibiting cross-examination about other relevant portions.[12] Because paragraph five of the letter would have harmonized the prior statements with Rainey's stance at trial, the jury was given an incomplete and misleading impression of Rainey's position. Under the "rule of com-

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12. The district court's limitation of Rainey's testimony was erroneous for another reason as well. As Rainey and Knowlton noted ,the district court permitted the defendant's inquiry into Rainey's letter, finding the statements in the letter admissible against Rainey as a prior inconsistent statement under Fed.R.Evid 801(d)(1)(A) and admissible against Knowlton as an adoptive admission under Fed.R.Evid. 801(d)(2)(B). Mr. Larry sought to question Rainey about paragraph five of the letter. Rainey and Knowlton contend that Rainey's statement in paragraph five should have been ruled admissible under Fed.R.Evid. 801(a)(1)(B) as "a prior consistent statement made by him offered to rebut an implied or express charge that in other parts or his letter he had made statements inconsistent with his trial theory." Brief for Appellants at 28-29. We agree.

pleteness'' embodied in Rule 106, the limitation of Rainey's testimony was thus inherently unfair and an abuse of discretion. Rainey and Knowlton are entitled to a new trial.

IV.

We hold that the trial judge committed reversible error in 1) admitting into evidence the evaluative conclusions and opinions contained in Lieutenant Commander Morgan's investigative report and 2) limiting Rainey's trial testimony. We therefore reverse the judgment entered against Rainey and Knowlton and remand for a new trial.

REVERSED AND REMANDED.

JOHNSON, Circuit Judge, concurring specially:

I concur with the panel's opinion in this case. I write separately to urge that, while we are clearly bound by *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980), to hold that the evaluative conclusions contained in Lieutenant Commander Morgan's report are not admissible under Fed.R.Evid. 803(8)(c), our interpretation of this rule is ripe for reconsideration.

Smith is an anomaly among the circuits. The majority view favors broad admissibility under Rule 803(8)(c)'s "factual findings" standard. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-301 (4th Cir.1984) ("[I]t is well established that the phrase should be interpreted broadly"). Weinstein's evidence treatise advocates such a reading, *Weinstein on Evidence* § 803(8)[03] (1985) ("[i]f the report states a conclusion that would be helpful—and is reliable—it should be admitted"), and

the Advisory Committee's Note may be read as consonant with this interpretation, *id.*

Broad admissibility releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question. This case presents an appropriate opportunity for reconsideration of this critical evidentiary issue by the full Court.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NOS. 84-3625, 84-3626

Order Granting Rehearing En Banc
791 F.2d 833 dated May 27, 1986

John C. RAINEY, Individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees,

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals
Eleventh Circuit.

May 27, 1986.

Appeals from the United States District Court for the Northern District of Florida; Winston E. Arnow, Judge.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion March 25, 1986, 11th Cir., 1986, 784 F.2d 1523)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active serving having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that the above-consolidated causes shall be reheard by this Court en banc *without* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs. The previous panel's opinion is hereby VACATED.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NOS. 84-3625, 84-3626

September 22, 1987 En Banc Opinion
827 F.2d 1498

John C. Rainey, Individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals,
Eleventh Circuit.

Sept. 22, 1987.

Appeals from the United States District Court for the Northern District of Florida.

Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, Circuit Judges.

PER CURIAM:

This case was taken *en banc* for the purpose of reconsidering controlling authority in this Circuit concern-

ing the admissibility in evidence of an opinion expressed in an investigative report of an airplane crash. The Court is evenly divided on the issue, however, so that the controlling authority remains as set forth in the panel decision. Since the Court is unanimous in upholding the panel's decision on the other evidentiary issue which requires a reversal for a new trial, the effect of this *en banc* procedure is to reinstate the panel opinion. *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir.1986). This opinion will simply review the case and the effect of this decision.

Lieutenant Commander Barbara Ann Rainey, a flight instructor with the United States Navy, and her student, Ensign Donald Bruce Knowlton, died on July 13, 1982 in a fiery airplane crash while practicing landings and takeoffs at Middleton Field, Alabama. Their spouses, John Charles Rainey ("Rainey") and Rondi M. Knowlton ("Knowlton") sought money damages under the Florida Wrongful Death Act, Fla.Stat.Ann. § 768.16-.27 in district court. The jury returned a verdict against the plaintiffs.

At trial, the only disputed issue was the cause of the fatal crash. Lieutenant Colonel David I. Habermacher, Jr., with authorization from the Manual of the Judge Advocate General § 0902, at 9-3 to -5, appointed Lieutenant Commander William C. Morgan, Jr. to conduct an investigation into the circumstances surrounding the aircraft accident. Lieutenant Commander Morgan's report, since it was prepared in conjunction with an authorized Judge Advocate General investigation, is a public record. Because no evidence was introduced to show that the report lacked trustworthiness, the factual findings contained in

the report are admissible under Rule 803(8). *Rainey*, 784 F.2d at 1527. In his report, however, Morgan also gave his opinion that pilot error was "[t]he most probable cause of the accident." *Id.* at 1526.

Rainey and Knowlton disagreed with Lieutenant Commander Morgan's opinion. In a letter written to Morgan about the "aircraft mishap," Rainey, also a flight instructor with the United States Navy, concluded that the mishap was not the result of pilot error but more probably "caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit." According to Rainey, this malfunction prompted an inflight "power interruption" or "rollback" making it impossible for Lieutenant Commander Rainey to sustain sufficient power to maintain flight.

Because the two people in the plane were killed and the aircraft was almost totally destroyed by fire, the parties relied heavily on opinions developed by expert witnesses. The defendants offered into evidence the opinion contained in the investigative report prepared by Lieutenant Commander Morgan.

Two points are raised on appeal. *First*, plaintiffs contend that John Charles Rainey's testimony was unduly restricted on cross-examination by his own attorney about his letter to Morgan after counsel for Beech Aircraft Corporation had called Rainey as an adverse witness. The panel opinion fully sets forth the circumstances concerning this issue and concludes the district court should be reversed for two reasons: (1) Fed.R.Evid. 106 requires the court to let Rainey testify as to the whole letter and, (2) the testimony was admissible under Fed.R.Evid. 801

(d)(1)(B). *Rainey*, 784 F.2d 1528-30. The Court is unanimous in concluding that the panel opinion is correct in reasoning and result, so no further discussion of the issue is in order here.

Second, Rainey and Knowlton appeal the district court's decision to admit into evidence, over their objection, the opinion as to cause of the accident in the investigative report prepared by Lieutenant Commander Morgan. Morgan did not testify at the trial. The panel held that prior precedent of this Court, found in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980), requires that the district court be reversed on this point. *Rainey*, 784 F.2d at 1527-28. *Smith* holds that "evaluative conclusions and opinions," such as those contained in Lieutenant Commander Morgan's report, are not admissible. 612 F.2d at 221-22. The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. Judge Johnson specially concurred in the panel opinion, noting that although *Smith* controlled the panel decision, it should be reconsidered *en banc*. *Rainey*, 784 F.2d at 1530.

Although this case was taken *en banc* for the purpose of reconsidering the evidentiary issue decided in *Smith*, the Court is evenly divided on the point. Judges Roney, Godbold, Hill, Fay, Vance and Clark would all adhere to *Smith*. Judges Tjoflat, Kravitch, Johnson, Hatchett, Anderson and Edmondson would follow the reasoning suggested in Judge Johnson's concurring opinion and overrule *Smith*.

Since the Court is evenly divided, there is no useful purpose in the publication of opinions setting forth the reasoning of either view. All judges agree that unless *Smith* is changed by the *en banc* court, it controls the issue in the district court. Since it takes a majority of the *en banc* court to change a prior precedent of this Court, *Smith* controls and the panel opinion properly decides the issue.

REVERSED and REMANDED.

TJOFLAT, Circuit Judge, specially concurring:

I concur in the en banc court's judgment in this case, reversing the district court because it improperly restricted the cross-examination of John Charles Rainey. The second issue in this case is whether the evaluative conclusions contained in Lieutenant Commander (LCDR) Morgan's investigative report are admissible under Fed.R.Evid. 803(8)(C).[1] I write separately to urge the court to take its place among the majority of our sister circuits, favoring broad admissibility under Rule 803(8)(C)'s "factual

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1. Fed.R.Evid. 803(8)(C) provides as follows:

   Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

   The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

   . . . .

   (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

findings" standard. Were we to adopt the majority view, I submit that we would hold that the district court in this case properly admitted the evaluative conclusions contained in the investigative report.

I.

On July 13, 1982, LCDR Barbara Ann Rainey, a flight instructor with the United States Navy, and her student, Ensign (ENS) Donald Bruce Knowlton, died in a fiery airplane crash while practicing "touch and go" landings and takeoffs[2] at Middleton Field in Alabama. The day after the crash, Lieutenant Colonel (LCOL) Habermacher of the United States Marine Corps, the Commanding Officer of LCDR Rainey's training squadron, under authority of the Manual of the Judge Advocate General § 0902, at 9-3 to 9-5, appointed LCDR William C. Morgan, Jr., to investigate the aircraft accident.[3]

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2. A "touch and go" pattern is a training exercise in which, after takeoff, the student circles the airfield in an oval pattern and then lands the aircraft; after landing, the student does not stop the plane but instead accelerates and takes off again.

3. The letter appointing LCDR Morgan to investigate the crash reads, in full, as follows:

   From: Commanding Officer, Training Squadron THREE
   To: LCDR William C. MORGAN, Jr., USN, 1310

   Subj: Investigation to Inquire into the Circumstances Connected with the Aircraft Accident which occurred at approximately 1020, 13 July 1982, approximately two miles southeast of Middleton Airport in Evergreen, Alabama.

   Ref: (a) JAG Manual Chapter VI and Section 0902, Chapter IX

(Continued on following page)

On September 1, 1982, LCDR Morgan, pursuant to the requirements established by the Judge Advocate General, filed a written report with LCOL Habermacher. Accompanying LCDR Morgan's investigative report were sixty documents, termed "enclosures," consisting of 159 pages. The enclosures included the following documents: sum-

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(Continued from previous page)

1. You are appointed to conduct an informal investigation in accordance with reference (a), as soon hereafter as practicable, for the purpose of inquiring into all circumstances surrounding the aforementioned accident.

2. You will conduct a thorough investigation into all the circumstances surronding [sic] the accident and report your findings of fact, opinions and recommendations as to the following:

a. The cause of the accident.

b. The possibility of administrative or disciplinary action.

c. Any claims for or against the U.S. Navy resulting therefrom.

d. Be advised that no statement taken by you need be subscribed under oath.

3. By copy of this appointing letter, the squadron Administrative Department is directed to furnish you assistance in preparing the report of your investigation.

4. This report will be completed not later than 13 August 1982. If additional time is required, you will submit in writing to the Commanding Officer the reasons for and the amount of additional time required.

/s/ D.I. HABERMACHER, JR.

On August 12, 1982, LCDR Morgan "requested that the due date for the informal investigation directed by reference (a) be extended for 14 days subsequent to the receipt of the autopsy protocol and toxicology reports and the results of the engineering investigation." On August 13, 1982, LCOL Habermacher approved LCDR Morgan's request.

maries of LCDR Rainey's naval flight and medical records and of Ensign Knowlton's aviation and medical records; Training Squadron Three's flight schedule for July 13, 1982; history and inspection records, including an outstanding maintenance action form, of the aircraft that crashed; air traffic control records; statements from the other instructors and students who were engaged in the "touch and go" exercise, as well as statements from other witnesses to the crash; crash crew rescue reports; aerial photographs of the crash site; casualty reports; the engineering investigative report on the aircraft's engine; photographs of the plane's wreckage; statement from the spouses of the crash victims; diagram of the Middleton Field traffic pattern; and copies of the autopsy protocol and toxicology reports of LCDR Rainey and ENS Knowlton. Based on the sixty enclosures and on his investigation, LCDR Morgan prepared a six-page summary, including a preliminary statement, findings of fact, opinions, and recommendations. That summary is reproduced here in full:

PRELIMINARY STATEMENT

1. As directed by enclosure (1) and in accordance with reference (a), an informal investigation was conducted into the circumstances surrounding the aircraft accident which occurred Southeast of Middleton Airport near Evergreen, Alabama, on 13 July 1982.

2. All reasonably obtainable evidence has been compiled and examined during the course of the investigation and all directives of the convening authority have been met. Certain real evidence collected by the Aircraft Accident

Board was also obtained, however, considerable care was taken to ensure a separate and accurate investigation.

3. All claims and potential claims for damages by landowners have been investigated. The original claim of Mr. William W. Ward has been hand carried to Naval Legal Service, Pensacola, Florida. No estimates were required with this claim based on a phone conversation with LCDR G.F. Indest of the Naval Legal Service in Pensacola, Florida. The other property owner involved, Mr. Roger Warrick of Gauiter, Mississippi, has been notified of the accident and furnished Standard Form 95 by registered mail.

4. Several witnesses were found that heard the radio transmissions and saw the aircraft just prior to the crash. They all seemed rational and observant. Witnesses interviewed were not designated as parties to the investigation and all were advised of the nature of the JAG investigation.

5. The unusual length of time required to complete this investigation was due to the delay in receiving the autopsy reports on the two pilots and the delay in receiving the engineering investigation on the engine of aircraft 3E955. Additional delays were due to the research required to validate points brought out in the engineering investigation.

FINDING OF FACT

1. At approximately 1020 local on 13 July 1982, a U.S. Navy T-34C aircraft, bureau number 160955, piloted by LCDR Barbara A. Rainey crashed approximately two miles Southeast of Middleton Airport near Evergreen, Alabama, (enclosure (3)).

2. LCDR Barbara A. Rainey, 558-72-0652, USNR, reported to Training Squadron THREE on 16 November 1981, (enclosure (4)). At the time of the accident LCDR Rainey was fully NATOPS qualified (Naval Air Training and Operation Procedures Standardization Program) and Instrument qualified (enclosure (5)) as well as being a qualified familiarization instructor, (enclosure (6)). As of 12 July 1982, LCDR Rainey had accumulated 1331 total flight hours of which 209 were logged in the T-34C aircraft. LCDR Rainey had logged 96.2 hours during the 90 days preceeding [sic] the accident, (enclosure (7)). LCDR Rainey's Aviator's Log Book indicated no record of previous accidents or flight violations, (enclosure (8)).

3. ENS Donald B. Knowlton, 548-04-6268, USNR, was on active duty and checked into Training Squadron THREE on 24 May 1982 for duty as a Student Naval Aviator, (enclosure (9)). He had an average flight grade of 2.94 and had accumulated 4.5 hours in the T-34C aircraft, (enclosure (10)).

4. LCDR Rainey was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (11)).

5. ENS Knowlton was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (12)).

6. LCDR Rainey and ENS Knowlton were scheduled to fly Familiarization Flight Four at 0645 on 13 July 1982 by Training Squadron THREE's flight schedule authorizing the flight, (enclosure (13)).

7. Aircraft 160955, a T-34C, was accepted by the Navy on 26 September 1978. Inspection of the aircraft records,

history, and logs revealed that all required maintenance inspections and technical directives had been complied with, (enclosure (14)). There was one outstanding discrepancy, the air-conditioning ground blower door spring was broken, (enclosure (15)).

8. Aircraft Technical Directive No. T-34C-017 which was designed to provide a manual back-up system for fuel metering, (enclosure (16)), was not installed, (enclosure (14)). Although much has been written about the need for a manual fuel control, (enclosures (17), (18), (19), (20) and (21)), it is still not installed in the T-34C aircraft, (enclosure (14)).

9. LCDR Rainey and ENS Knowlton were issued aircraft 160955 and LCDR Rainey signed the acceptance sheet thereby assuming the responsibility of pilot in command, (enclosure (22)).

10. Review of North Whiting Tower traffic control strips for 13 July 1982 show that aircraft 160955 (3E955) departed North Whiting Field at 0915 local under VFR conditions, (enclosure 23)).

11. The weather observed indicated no conditions that would have a direct effect on the flight, (enclosure (24)). Weather in the Middleton pattern was excellent with no clouds, visibility 5 miles or more, and winds light and from the south, (enclosures (25), (26), (27) and (28)).

12. At approximately 1001, 3E955 entered the pattern at Middleton Field for Runway 18. At least four approaches were flown with a minimum of two "touch and go's" completed prior to the accident, (enclosure (28)).

13. At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned, (enclosures (25), (27), (29), (30), (31) and (32)).

14. Upon receiving notification of a crash and seeing smoke to the southeast of Middleton Field, the crash crew immediately began transit to the crash site, (enclosures (27), (28) and (29)).

15. The [wreckage] of 3E955 crashed into a farmer's field of cutover timber with scattered trees in the area. The area has slightly rolling hills with a small dirt road passing near the crash site, (enclosure (41)).

16. 3E955 crashed on property owned by Mr. Roger Warrick. Transit to the crash site required that the crash crew and other vehicles cross property owned by Mr. William W. Ward, (enclosure (42)).

17. During transit to the crash site, the crash crew had difficulty in locating the [wreckage] due to the muddy road conditions and the circuitous route required to go around a small stream and follen [sic] trees. Additionally, there were no current, detailed maps of the local area available to the crash crew. 3E467, piloted by LCDR Richard E. Blake, was over the crash site and assumed on scene command and attempted to direct the crash crew to the [wreckage], (enclosures (27), (28), (31) and (33)).

18. ABHI R.S. Scribner stated that at approximately 1022 local, he stopped the crash truck and picked up a civilian who assisted in locating the [wreckage] of 3E955, (enclosure (28)).

19. LT Ted J. Choley stated that at approximately 1030 local, he received a call from LT Will Carpenter on base radio stating that there was an accident at Middleton Field, (enclosure (36)).

20. At 1035 local, North Whiting Field operations was notified of a possible aircraft accident near Middleton Field, (enclosure (37)).

21. Upon arrival at the [wreckage] at 1040 local, the crash crew immediately began efforts to extinguish the fire using AFFF (lite water) and attempted to locate survivors. No response was heard to ABHI Scribner's call to crewmembers of the aircraft. The burned bodies of both pilots were noted at this time, (enclosures (27), (28), (34) and (35)).

22. When all the AFFF (lite water) on the truck was depleted, the crash crew used all of the portable fire extinguishers on the truck in an attempt to put out the fire. When this failed, they resorted to shoveling dirt on the fire in an attempt to smother it, (enclosures (27), (28), (31), (34) and (35)). At 1042 local, all fires were extinguished with the exception of a magnesium fire which the crash crew was unable to put out, (enclosure (38)).

23. LCDR Rainey sustained a lethal neck injury at impact but bodily functions continued for an undetermined period, (enclosures (52) and (55)).

24. ENS Knowlton was killed instantly due to massive head injuries sustained at impact, (enclosures (52) and (56)).

25. At some undetermined point in the crash sequence, the rotary buckle holding the shoulder straps of the from [sic] cockpit harness failed, (enclosure (50)).

26. At some point during the flight or the subsequent crash, a LPA (life preserver assembly) inflation lever was moved to the activated position, (enclosure (51)).

27. At the time of impact, the engine of 3E955 was operating but was operating at reduced power, (enclosure (48)).

28. At 1050 local, HT-18 launched aircraft 171 as a SAR (search and rescue) mission to Middleton Field, (enclosure (39)). The aircraft arrived at the crash site at 1125 local and assumed on scene command from 3E467. 3E467 was relieved from communications relay duties at 1130 local, (enclosure (33)).

29. Upon landing at the site, the crew of aircraft 171 was informed that there were no survivors, (enclosures (43), (44) and (45)).

30. At 1050 local, HC-16 was notified by phone of an aircraft accident near Middleton Field. At 1105 local, a UH-1N launched and proceeded to the crash site, arriving there at 1150 local. Upon landing, HC-16 was requested to transport the bodies of the victims to NARMC (Naval Aerospace Regional Medical Center). The remains of the pilots were removed from the [wreckage], placed in body bags, and moved to the helicopter. Takeoff from the crash site was at 1430 local, and arrival at NARMC was at 1515 local. The remains were taken from the helicopter and placed in an ambulance for transportation to the hospital, (enclosure (40)).

31. An Engineering Investigation was conducted on the engine of aircraft 160955 by the Naval Air Rework Facility, NAS Pensacola, Florida, (enclosure (48)).

OPINIONS

1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

5. Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground. However, from evidence available and the information gained from eyewitnesses, a possible scenario can be constructed as follows:

a. 3E955 entered the Middleton pattern with ENS Knowlton at the controls attempting to make normal landings.

b. After two unsuccessful attempts, LCDR Rainey took the aircraft and demonstrated two landings "on the numbers". After getting the aircraft safely airborne from the touch and go, LCDR Rainey transferred control to ENS Knowlton.

c. Due to his physical strength, ENS Knowlton did not trim down elevator as the aircraft accelerated toward 100 knots; in fact, due to his inexperience, he may have trimmed incorrectly, putting in more up elevator.

d. As ENS Knowlton was climbing to pattern altitude, he did not see the aircraft established on downwind so he began his crosswind turn. Due to ENS Knowlton's large size, LCDR Rainey was unable to see the conflicting traffic.

e. Hearing the first call, LCDR Rainey probably cautioned ENS Knowlton to check for traffic. Hearing the second call, she took immediate action and told ENS Knowlton she had the aircraft as she initiated a turn toward an upwind heading.

f. As the aircraft was rolling from a climbing left turn to a climbing right turn, ENS Knowlton released the stick letting the up elevator trim take effect causing the nose of the aircraft to pitch abruptly up.

g. The large angle of bank used trying to maneuver for aircraft separation coupled with the abrupt pitch up caused the aircraft to stall. As the aircraft stalled and went into a nose low attitude, LCDR Raney reduced the PCL (power control lever) toward idle. As she was rolling toward wings level, she advanced the PCL to maximum to stop the loss of altitude but due to the 2 to 4 second lag in engine response, the aircraft impacted the ground before power was available.

6. Although the above sequence of events is the most likely to have occurred, it does not change the possibility that a "rollback" did occur.

7. The most probable cause of the accident was the pilots [sic] failure to maintain proper interval [between LCDR Rainey's aircraft and another aircraft in the pattern].

8. There are many items that are considered as possible contributing factors to the accident. They are listed as follows:

a. The design of the aircraft which limits forward visability [sic] when in a climb.

b. The performance of the engine from idle to max power and the associated lag.

c. The relative size of the individuals, ENS Knowlton's size and strength could enable him to overpower LCDR Rainey in a panic situation.

d. The possibility that an LPA (life preserver assembly) was inflated at a critical time.

e. The inability of early stage students to trim correctly.

9. The Middleton Crash Crew and the RDO (Runway Duty Officer) acted in a very professional manner.

RECOMMENDATIONS

1. That the claim of Mr. William W. Ward be honored.

2. That a flight for the NATOPS syllabus be designed to familiarize all pilots with the different type stalls that may be encountered.

3. That landing lights be used in the landing pattern to enhance visibility of aircraft established downwind.

4. That every effort be made to incorporate Aircraft Technical Directive No. T-34C-0147 at the earliest possible date.

/s/ W.C. Morgan, Jr.

In letters to the Judge Advocate General of the United States Navy, the following officers endorsed LCDR Morgan's investigative report: the Commanding Officer of Training Squadron Three (LCOL Habermacher), the Commanding Officer of Training Squadron Five, the Chief of Naval Education and Training, and the Chief of Naval Operations. In addition, two other officers sent endorsement letters to LCOL Habermacher. Although a few endorsers took issue with some of LCDR Morgan's recommendations, none disagreed with any of his opinions that were admitted into evidence.

Disagreeing with LCDR Morgan's opinion that pilot error was "[t]he most probable cause of the accident," the spouses of the crash victims, John Charles Rainey and Rondi M. Knowlton, filed separate suits on April 15, 1983 in the district court against the manufacturer of the aircraft, Beech Aircraft Corporation, the manufacturer of the aircraft's engine, Pratt & Whitney Canada, Inc., and the Navy's contract maintenance service for the aircraft, Beech Aerospace Services, Inc.[4] Each plaintiff alleged negligence and strict product liability causes of action and

4. Rainey brought suit individually, as the personal representative of his wife's estate, and on behalf of his minor children, Cynthia Ann Rainey and Katharine Marie Rainey. Knowlton brought suit individually, as the personal representative of her husband's estate, and on behalf of her minor children, Ramsey Nia Knowlton and Branigan McDermott Knowlton.

sought money damages under the Florida Wrongful Death Act, Fla.Stat. §§ 768.16-.27 (1985). Specifically, Rainey and Knowlton each alleged that "[t]he aircraft and engine were equipped with a pneumatic fuel control system which was defective in its design and/or manufacture in that it was prone to malfunction in such [a] way as to cause 'power interruptions' . . . such that the pilot of the subject aircraft was unable to sustain sufficient power to maintain flight." The spouses alleged that Beech Aircraft and Pratt & Whitney were negligent in designing and manufacturing the aircraft and engine in that they knew or should have known of the defects; they alleged that Beech Aerospace Services, Inc. was negligent when it issued to LCDR Rainey an aircraft that it knew or should have known had a defective fuel control system. Both Rainey and Knowlton sought punitive damages against the defendants, contending that they acted "in reckless disregard for the safety of decedent and other persons who they knew would fly the aircraft." At a pretrial conference on March 20, 1984, the district court granted Beech Aircraft Corporation's motion to consolidate the two cases for all purposes, including trial.

During that same pretrial conference, the district court held that LCDR Morgan's investigative report was trustworthy and that his factual findings, but not his opinions or conclusions, would be admissible. On July 10, 1984, during a hearing held the day before trial, the district court reversed in part its prior ruling on the admissibility of LCDR Morgan's report. The court reiterated that "the defendants [could] place in evidence before the Jury the findings of facts, 31 in number, that were in the JAG report." The court further held "that the opinions attached

to those 31 findings may also be admitted, to the extent that they are opinions and conclusions." According to the district court, however, not every "opinion" in LCDR Morgan's report was admissible under Fed.R.Evid. 803 (8)(C):

> Paragraph five is nothing but a possible scenario, as it's called, and would not be allowed in. Paragraph eight talks about possible contributing factors and it would not be allowed in. Paragraph nine, which says somebody acted in a very professional manner, would not be allowed in because it is not relevant.

Accordingly, the district court held that paragraphs five, eight, and nine of the report's "opinions" section would not be allowed into evidence at trial.[5]

The plaintiffs objected to the district court's new ruling on the admissibility of the JAG report, citing *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980).[6] In light of the court's ruling, the plaintiffs requested an opportunity to review the JAG report for the purpose of offering evidence and witnesses relating to LCDR Morgan's "Opinion" No. 7 (which appears to be based on "Finding of Fact" No. 13): "The most probable cause of the accident was the pilots [sic] failure to maintain proper interval." The district court granted the plaintiffs' request.

The only disputed issue at trial was the cause of the fatal crash. The parties relied heavily on opinions of ex-

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5. *See infra* note 7.

6. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

pert witnesses. The defendants relied in part on excerpts from the opinions contained in LCDR Morgan's investigative report.[7] The following "opinions" from that report were admitted into evidence:

> 1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.
>
> 2. There is no factual evidence of command or supervisory error.
>
> 3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, sociologically [sic], or mentally prepared to complete their flight.
>
> 4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.
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> . . . .

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7. The trial exhibits are not part of the record on appeal. Although the court has before it a complete copy of LCDR Morgan's investigative report, which presumably was included in the record on appeal as an exhibit to a memorandum filed in support of a motion, I can only assume, as the parties agree, that the portions of the report that the district court on July 10, 1984 ruled would be admissible at trial were actually admitted into evidence. I therefore assume that all 31 of the report's findings of fact were admitted into evidence, along with all of the report's opinions except paragraphs five, eight, and nine. (I also assume that the district court struck the opinion in paragraph six, which deals with the possibility that a "rollback" caused the accident, because that opinion can only be read along with paragraph five, which the district court explicitly held inadmissible during the July 10, 1984 pretrial conference.) Additionally, a colloquy between the trial judge and the parties' lawyers, outside the presence of the jury, indicates that the court also admitted into evidence the maintenance record of the plane that crashed; that record was attached to LCDR Morgan's report.

> 7. The most probable cause of the accident was the pilots [sic] failure to maintain proper interval.

On July 20, 1984, the jury returned a verdict for the defendants, finding that the deaths of LCDR Rainey and ENS Knowlton were not legally caused by the aircraft's fuel control system, and that there was no negligence on the part of Beech Aircraft, Pratt & Whitney, or Beech Aerospace that legally caused the deaths of LCDR Rainey and ENS Knowlton.

On August 1, 1984, the plaintiffs filed a motion for a new trial, challenging two of the trial judge's evidentiary rulings. The district court denied the motion, and this appeal followed.

A panel of this court reversed the district court, holding that the district court improperly restricted plaintiff Rainey's trial testimony and that it improperly admitted into evidence, contrary to precedent of this court found in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980), the opinions contained in LCDR Morgan's investigative report. We took the case en banc to consider both evidentiary issues, thereby vacating the panel's opinion and judgment by operation of law. *See* 11th Cir.R. 26(k). I write now to urge that the en banc court reject the holding of *Smith* and affirm the district court's ruling admitting into evidence the opinions contained in LCDR Morgan's investigative report.

II.

To be admissible, an investigative report of the sort prepared by LCDR Morgan must satisfy the hearsay exception for public records and reports found in Fed.R.

Evid. 803(8)(C). That rule provides a hearsay exception for "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R. Evid. 803(8)(C). As to the rule's public record requirement, the en banc court holds that LCDR Morgan's investigative report is a public record: it was prepared in conjunction with an authorized Judge Advocate General investigation.

As to the rules caveat that certain findings of a public record are admissible unless the sources of the information that lead to the findings or other circumstances indicate that such sources were untrustworthy, there is no evidence in the record that would indicate that the sources upon which LCDR Morgan relied lacked trustworthiness. The burden was on the plaintiffs to show that the report was inadmissible if they believed that its sources of information or other circumstances indicated that the report lacked trustworthiness. *See* Fed.R.Evid. 803(8) advisory committee's note (Rule 803(8) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present"); *see also Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir.1975)). Although the plaintiffs knew months before trial that the defendants would seek to admit LCDR Morgan's investigative report into evidence, they neither attacked the

qualifications of LCDR Morgan nor the methodology he employed. During the July 10, 1984 pretrial conference, the plaintiffs requested leave to review the report to determine whether to present evidence bearing on the trustworthiness of the report's opinions. The district court granted the plaintiffs' request, but they presented no evidence challenging the report's trustworthiness and did not seek a continuance to gather such evidence. The plaintiffs have not met their burden. For these reasons, this court cannot, and does not, set aside the district court's finding that the report is trustworthy.

The issue that divides us is whether "factual findings resulting from an investigation," Fed.R.Evid. 803(8)(C) encompass evaluative conclusions derived from the report. The panel that heard this appeal answered in the negative, concluding that it was bound by the former Fifth Circuit's interpretation of "factual findings" in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980). *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1527-28 (11th Cir.1986) (per curiam). In a separate concurring opinion, Judge Johnson described *Smith* as "an anomaly among the circuits" and urged the en banc court to reject the *Smith* court's reasoning and to adopt a rule favoring broad admissibility of evaluative conclusions contained in investigative reports that are trustworthy public records and are relevant to the issues in question. *See id.* at 1530 (Johnson, J., concurring specially). I agree with Judge Johnson.

III.

In *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980), the former Fifth Circuit considered the admissibility under

Fed.R.Evid. 803(8)(C) of excerpts from a Coast Guard Marine Board of Investigation Report. Acknowledging that the legislative history of the rule does not unambiguously resolve the issue and that the federal courts have disagreed over the appropriate interpretation of "factual findings," the *Smith* court reached this conclusion:

> [T]he language of Rule 803 suggests that "factual findings" defines something other than "opinions" and "diagnoses" which are admissible under Rule 803(6) when contained in the records of "a regularly conducted business activity." Rule 803(8), although similar to Rule 803(6), substitutes the term "factual findings" for "opinions" and "diagnoses." Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings.

Id. at 221-22 (citing *Complaint of Am. Export Lines, Inc.*, 73 F.R.D. 454, 457 (S.D.N.Y.1977)).[8] Accordingly, the

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8. Fed.R.Evid. 803(6) provides as follows:

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(6) Records of regularly conducted activity. A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledgeable, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, un-

(Continued on following page)

Smith court held that "evaluative conclusions and opinions of the Coast Guard Marine Board of Investigation contained in the report should not have been admitted into evidence." *Id.* at 222. In my view, the *Smith* court misinterpreted "factual findings" within the meaning of Rule 803(8)(C), unduly limiting the rule's scope.

A.

A literal reading of Rule 803(8)(C) hardly lends itself to a restrictive interpretation. The rule creates a hearsay exception for trustworthy public reports "setting forth . . . factual findings resulting from an investigation." Fairly read, the rule admits not merely "factual findings," but reports in their entirety, as long as the reports are trustworthy and contain factual findings. After all, this hearsay exception is entitled "public records and reports," not "factual findings set forth in public records." *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1143 (E.D.Pa.1980) ("The language of 803(8)(C) literally provides for the admission of entire agency reports so long as those reports include, *inter alia*, factual findings. . . ."), *aff'd in relevant part*, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The Advisory Committee Notes support this reading of the rule. The Committee couched its discussion in terms

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less the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

of the admissibility of evaluative reports.[9] Although the Committee understood that the rule "assumes admissibility in the first instance," it believed that the rule provides "ample provision for escape if sufficient negative factors are present." Fed.R.Evid. 803 advisory committee's note. The Committee offered a nonexclusive list of "[f]actors which may be of assistance in passing upon the admissibility of evaluative reports":

> (1) the timeliness of the investigation, McCormack, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, *id.*, (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir.1944); (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).

Fed.R.Evid. 803 advisory committee's note. Notably the Committee did not even mention the possibility that admissibility would be limited to those portions of evaluative reports that present "factual findings."

The House Judiciary Committee "approved Rule 803 (8) without substantive change from the form in which it was submitted by the [Supreme] Court." Report of the Committee on the Judiciary, H.R.Rep. No. 650, 93d Cong., 1st Sess. 14 (1973), *reprinted in* 1974 U.S.Code Cong. & Admin.News 7051, 7075, 7088. The Committee,

9. Evaluative reports under Rule 803(8)(C) "are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case." Fed.R.Evid. 803 advisory committee's note.

however, adopted a somewhat tortured reading of the public records hearsay exception: "The Committee intends that the phrase 'factual findings' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule." *Id.* That reading is tortured not only because it erroneously focuses on the admissibility of factual findings contained in public reports, rather than on, as the Rule says, public records "setting forth . . . factual findings resulting from an investigation," but also because it contorted the meaning of "factual findings."

A "finding" is "[a] decision upon a question of fact reached as the result of a judicial examination or investigation by a court, jury, referee, coroner, etc." Black's Law Dictionary 569 (5th ed.1979). That is, a finding "commonly applies to the result reached by a judge or jury." *Id.* In other words, a "finding" or a "finding of fact" refers to the result or conclusion drawn by an investigator, whether it be a fire inspector, judge, or jury, "from facts without exercise of legal judgment." *Id.* The common meaning of finding therefore comports with investigative conclusions (i.e., results derived from the examination of facts), but not with idle speculation or legal conclusions: "a finding does not include legal conclusions that may have been reached by an investigator and is necessarily something more than a mere recitation of evidence, although we think the term is broad enough to encompass any statement of fact that represents a conclusion on the part of an investigator." *Zenith Radio Corp.*, 505 F.Supp. at 1144 (footnote omitted). Thus, by way of example, the following investigative (or evaluative) conclu-

sions are "factual findings": whether a traffic light was green or red (there were no eyewitnesses) moments before an automobile accident, *see Baker v. Elcona Homes Corp.*, 588 F.2d 551, 554-59 (6th Cir.1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); whether a public school board had established and maintained an elementary school as a black school for segregative purposes, *see United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1354-55 (6th Cir.1978); whether a state trooper who fatally shot a man who attacked him acted within the guidelines of the department's Policies and Procedures Manual, *see Perrin v. Anderson*, 784 F.2d 1040, 1046-47 (10th Cir.1986); whether a state trooper acted contrary to department training when he attempted to handcuff a person while holding a cocked weapon, *see Wilson v. Beebe*, 770 F.2d 578, 589-90 (6th Cir.1985) (en banc); whether a crewmember of a ship started a fight, *see Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1182-83 (3d Cir.), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978); whether the captain of a tow boat acted reasonably in mooring the vessel and setting the watch, *see In re Paducah Towing Co.*, 692 F.2d 412, 419-21 (6th Cir. 1982); whether there is a statistically significant link between tampon use and toxic shock syndrome, *see Ellis v. International Playtex, Inc.*, 745 F.2d 292, 299-304 (4th Cir. 1984); and whether a phone company's tariffs were unreasonable and discriminatory, *see Litton Systems, Inc. v. AT & T*, 700 F.2d 785, 819 (2d Cir.1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984).

The Senate Judiciary Committee rejected the House Committee's narrow interpretation of "factual findings," opting instead for the Advisory Committee's view:

> The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."
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> . . . .
>
> The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish[es] sufficient guidance on the admissibility of evaluative reports.

Report of the Committee on the Judiciary, S.Rep. No. 1277, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. Code Cong. & Admin.News 7051, 7064-65.[10]

The Conference Committee did not resolve the differing views of the term "factual findings." The Conference Committee Notes make no reference to the scope of Rule 803(8) or to the meaning of "factual findings." *See Notes of Conference Committee*, H.R. Conf.Rep. No. 1597, 93d Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin.News 7098; *see also Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 (6th Cir.1978), *cert. denied*, 441 U.S. 993, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979).

The legislative history as to the admissibility of evaluative conclusions is indeed equivocal. Nevertheless, the Senate's view is more consistent with the other hearsay exceptions and with the general spirit of the Federal Rules of Evidence, and is more easily justified on policy grounds. *See United States v. AT & T*, 498 F.Supp. 353, 359 (D.D.C.1980) ("Extrinsic materials indicate that the Rule is most appropriately considered by following the Senate Committee's position.").

Rule 803(6), the regular entries rule, creates a hearsay exception for reports or records "of acts, events, conditions, opinions, or diagnoses . . . if kept in the course of a regularly conducted business activity . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed.R. Evid. 803(6). Because Rule 803(6) uses the terms "opinions" and "diagnoses," whereas Rule 803(8)(C) uses the term "factual findings," the *Smith* court inferred that Congress must have intended that those terms have distinct meanings and, more specifically, that "factual findings" not encompass evaluative conclusions. *See Smith v. Ithaca Corp.*, 612 F.2d 215, 221-22 (5th Cir.1980). The *Smith* court reached this erroneous result, I believe, because it apparently gave no credence to the Advisory Committee's Note on Rule 803(6).

Tracing the origins of the regular entires rule, the Advisory Committee noted that "[e]ntries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results." Fed.R.Evid. 803 advisory committee's note. The Committee acknowledged, however, that the Commonwealth Fund Act, 28 U.S.C. § 1732, the Uniform Business Records as Evidence Act, Model Code Rule 514, and Uniform Rule 63(13) contained limiting and ambiguous language with respect to diagnoses, test results, and opinions. Thus, according to the Advisory Committee, "[i]n order to make clear its adherence to the [trend toward freely admitting diagnostic entries,] the rule specifically includes both diagnoses and opinions, in addition to acts, events, and condi-

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10. The Senate and House versions of Rule 803(8) differed slightly. The Senate version referred to another proposed rule, relating to the admissibility of certain criminal law enforcement records and reports. That reference was deleted by the Conference Committee, which adopted the House's version of the rule. *See* 4 J. Weinstein's & M. Berger, *Weinstein's Evidence* 803-23 (1985); *see also Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 n. 6 (6th Cir.1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979).

tions, as proper subjects of admissible entries." Fed.R. Evid. 803 advisory committee's note.[11]

Given this account of why the regular entries rule makes explicit reference to diagnoses and opinions, it strikes me as absurd to cite the language of that rule as support for an argument limiting the scope of "factual findings" within the meaning of the public records rule. The reason that the regular entries rule specifically mentions "diagnoses" and "opinions" has nothing whatsoever to do with why Rule 803(8) employs the term "factual findings." If anything, attributing a severely restricted significance to the phrase "factual findings" would be inconsistent with the regular entries rule: "No legislative history points to any intent on the part of Congress to limit the public records exception [Rule 803(8)] so as to exclude records which had previously qualified for admission pursuant to the business entries exception [Rule 803(6)." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803 (8)[03] (1985) (citation omitted).

In addition, "[b]road admissibility [under Rule 803 (8)(C)] releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir.1986) (Johnson, J., concurring specially); *see also* Fed.R.Evid. 704(a) ("[T]estimony in the form of an opinion or inference

11. The House Committee Notes, the Senate Committee Notes, and the Conference Committee Notes do not discuss the significance of Rule 803(6)'s use of the terms "opinions" and "diagnoses" or how the scope of those terms differs from the scope of "factual findings," as used in Rule 803(8)(C).

otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier-of-fact."). Thus, consistent with the basic approach that opinions should be admitted when helpful to the trier of fact, *see* Fed.R.Evid. 704 advisory committee's note, trustworthy and relevant evaluative opinions should be admitted under the public records exception of Rule 803(8)(C), as long as jurors can ascertain the significant facts that form the basis of the opinion. *See* 4 J. Weinstein & M. Berger, *supra*, ¶ 803(8)[03].

B.

Broad admissibility of public records containing evaluative conclusions (i.e., normative judgments drawn from the analysis of facts) is good policy because these reports are presumptively reliable. Rule 803(8)(C) is premised on "the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." Fed.R.Evid. 803 advisory committee's note (citing *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir.1952)). Admission of public records can be justified "by the probability that the officials conducting the investigation (who themselves are under a public duty) will be careful and discriminating in selecting the factual data upon which to rely in reaching their findings and conclusions." G. Lilly, *An Introduction to the Law of Evidence* 245 (1978). Most investigators under a public duty lack a motive to distort the facts or their conclusions. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir.1984); *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618-19 (8th Cir.1983); *see also Melville v. American Home Assurance Co.*, 443 F.Supp.

1064, 1112 (E.D.Pa.1977), ("[P]ublic records or reports, by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial."), *rev'd on other grounds,* 584 F.2d 1306 (3d Cir.1978).

Dean McCormick offered several other reasons for allowing a trier of fact to receive an investigative report —including the investigator's conclusions based on the facts he has gathered—as evidence:

> The most important reason is time. The officer comes on the scene usually as early as it is feasible to get there. Usually the investigators of the parties come later and the statements are frequently partial and one-sided. The witnesses at the trial have often only a dim recollection of the event, and their testimony rests mostly on their pre-trial refreshment of memory by these statements. The officer is often able to interview witnesses before they have been pulled one way or the other by parties. The officer, too, is frequently a specialist—a doctor reporting death, a fire marshall investigating a fire—or at least experienced in like investigations, such as a highway patrolman reporting on a collision.

McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 Iowa L.Rev. 363 (1957). Because the source of these public reports—an investigator operating under authority of law—is presumptively reliable, "there is no reason not to admit the findings simply because they tend towards the conclusory rather than the factual end." *United States v. AT & T,* 498 F.Supp. 353, 360 (D.D.C.1980); *see also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.,* 505 F.Supp. 1125, 1144 (E.D.Pa. 1980) ("[F]actual statements need not be formally termed 'findings' in order to come in under 803(8)(C)."), *aff'd*

in relevant part, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 583 (1986).

The presumption that evaluative reports of this sort are trustworthy is, of course, rebuttable. Not every public report made pursuant to an investigation authorized by law that contains factual findings will be admissible. Rule 803(8)(C) allows for the admission of evaluative reports "unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R.Evid. 803(8)(C). In other words, "if sufficient negative factors are present" to indicate that the report is not trustworthy, then it should not be admitted. *See* Fed.R.Evid. 803(8) advisory committee's note. "The factors that may be used to determine admissibility include: (1) the timeliness of the investigation; (2) the special skill or experience of the official; and (3) possible motivation problems." *Ellis v. International Playtex, Inc.,* 745 F.2d 292, 300-01 (4th Cir.1984) (citing Fed.R.Evid. 803(8)(C) advisory committee's note); *see also Perrin v. Anderson,* 784 F.2d 1040, 1047 (10th Cir.1986). The court's consideration of such negative factors provides an exclusionary mechanism sufficient to safeguard against the admission of unreliable evidence. *Melville v. American Home Assurance Co.,* 584 F.2d 1306, 1316 (3d Cir.1978).

The burden to demonstrate that an investigative report is not reliable is on the party opposing admission of the report. *Ellis,* 745 F.2d at 301 (citing *Kehm v. Procter & Gamble Mfg.,* 724 F.2d 613, 618 (8th Cir.1983); *Baker v. Elcona Homes Corp.,* 588 F.2d 551, 558 (6th Cir.1978), *cert. denied,* 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661

(1979)). As a practical matter, this makes a good deal of sense:

> Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. Rather than requiring the moving party to spend considerable time and money to ensure that the experts who conducted the study are available at trial, it is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.

Ellis, 745 F.2d at 301.

C.

Rule 803(8) must be viewed in conjunction with the other rules of evidence. Accordingly, the admissibility of Rule 803(8)(C) public records of an evaluative nature, which in most cases are prepared by experts, should be interpreted broadly so that Rule 803(8)(C) is consistent with Rule 703, which provides that facts forming the basis of an expert's opinion need not themselves be admissible as long as they are "of a type reasonably relied upon by experts in the particular field." Fed.R.Evid. 703;[12] *see*

12. Fed.R.Evid. 703 provides in full as follows:

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

also Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F.Supp. 1125, 1148 (E.D.Pa.1980), *aff'd in relevant part*, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Furthermore, although public records are excepted from the hearsay evidence rule because they are presumed generally to be reliable, the reliability of a particular evaluative report can be tested not only with the trustworthiness inquiry called for by Rule 803(8)(C), but also with the objections permitted by Rules 702 and 705. *See Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978). Rule 702 allows objections to the qualifications of an expert witness,[13] and Rule 705 allows disclosure on cross-examination of facts and data underlying an expert's testimony.[14] Of course, an evaluative report admissible

13. Fed.R.Evid. 702 provides as follows:

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

14. Fed.R.Evid. 705 provides as follows:

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. In *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978) (citation and footnote omitted), the Third Circuit noted the following:

Before these objections [under Rules 702 and 705] may be recognized, however, the party challenging the validity of

(Continued on following page)

under Rule 803(8) may have to be excised in part under Rules 401 and 402, providing that irrelevant evidence is inadmissible,[15] and under rule 403, excluding relevant evidence on grounds of prejudice, confusion, or waste of time.[16]

In sum, "Rule 803(8) should be interpreted in accord with th[e] treatment of 'opinion' evidence. If the report

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(Continued from previous page)

an official report admitted under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness To allow objections to be sustained under Rules 702 and 705 without a showing of untrustworthiness would have the practical effect of nullifying the exception to the hearsay rule provided by Rule 803(8)(C).

15. Fed.R.Evid. 401 provides as follows:

Rule 401—Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed.R. Evid. 402 provides as follows:

Rule 402—Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

16. Fed.R.Evid. 403 provides as follows:

Rule 403—Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

states a conclusion that would be helpful—and is reliable—it should be admitted." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(8)[03] (1985) (footnote omitted). This determination is a matter to be left within the sound discretion of the district court. The court would thus be "free to say, pursuant to Rule 803(8)(C), 'In this particular case and in view of the shaky foundation for the conclusions, I will exclude the report unless you produce the reporting officer.'" *Id.* (quoting McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 Iowa L.Rev. 363, 369 (1957)). Another way the trial court can safeguard the rights of the party against whose interest the report is being introduced is to comment on the weight of the evidence, *id.*, and to issue an instruction cautioning the jurors against substituting the investigator's judgment for their own, *id.*; *see also In re Plywood Antitrust Litig.*, 655 F.2d 627, 637 (5th Cir. Unit A Sept.1981), *cert. dismissed*, 462 U.S. 1125, 103 S.Ct. 3100, 77 L.Ed.2d 1358 (1983); *Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 n. 3 (W.D.Mo.1982).

D.

Finally, I note that the weight of authority is against the reasoning of *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980). In 1976, the Supreme Court noted that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*. See Fed.Rule Evid. 803(8)(C)." *Chandler v. Roudebush*, 425 U.S. 840, 863 n. 39, 96 S.Ct. 1949, 1961 n. 39, 48 L.Ed.2d 416 (1976) (citation omitted). The *Smith* court made no reference to the Supreme Court's broad reading of Rule 803(8)(C).

See Cohen v. General Motors Corp., 534 F.Supp. 509, 512 (W.D.Mo.1982) ("[I]t appears that the Supreme Court has given a broad directive for liberal use of agency findings, somewhat at variance with Judge Wisdom's cautious approach in [*Smith*].").

As Judge Johnson has noted, "*Smith* is an anomaly among the circuits. The majority view favors broad admissibility under Rule 803(8)(C)'s, 'factual findings' standard. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-301 (4th Cir.1984) ('[I]t is well established that the phrase should be interpreted broadly')." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir. 1986) (Johnson, J., concurring specially); *see also Perrin v. Anderson*, 784 F.2d 1040, 1046-47 (10th Cir.1986); *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618-19 (8th Cir. 1983); *Litton Systems, Inc. v. AT & T*, 700 F.2d 785, 819 (2d Cir.1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 554-59 (6th Cir.1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978). Even in the Fifth Circuit, *Smith* has not been uniformly followed. *See, e.g., Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543, 547 (5th Cir.1982) (district court properly admitted Coast Guard accident report that attributed blame in shipping case); *Local Union No. 59, Int'l Bhd. of Elec. Workers v. Namco Elec., Inc.*, 653 F.2d 143, 145 (5th Cir. Unit A Aug. 1981) (findings in NLRB invesigative letter admissible under Rule 803(8)(C)); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir.1980) ("The district judge was, indeed, in error in refusing to admit the investigative report and determination of the EEOC."),

cert. denied, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). Additionally, courts that have considered the admissibility of JAG reports, similar to the one prepared by LCDR Morgan, under Rule 803(8)(C) have broadly interpreted "factual findings." *See, e.g., Walker v. Fairchild Indus.*, 554 F.Supp. 650, 653 (D.Nev.1982); *Sage v. Rockwell Int'l Corp.*, 477 F.Supp 1205, 1207-10 (D.N.H. 1979); *Schoenborn v. Boeing Co.*, 586 F.Supp. 711, 725, 18 Av. Cas. (CCH) 18,335, 18,344-45 (E.D.Pa.1984).

IV.

A majority of this court agrees that LCDR Morgan's investigative report is a public record and that it is trustworthy for purposes of Rule 803(8)(C). The report is certainly of the sort that the rule contemplates as trustworthy: the report is thorough, as evidenced by the supporting documents totaling 159 pages, and LCDR Morgan's conclusions are credible, having been endorsed by six fellow officers of various ranks. Moreover, the district court gave the plaintiffs ample opportunity to challenge the trustworthiness of the report; nevertheless, the plaintiffs presented no evidence attacking the qualifications of LCDR Morgan or the methodology he employed.

The sole issue that evenly divides this court is whether "factual findings resulting from an investigation," Fed.R.Evid. 803(8)(C), encompass evaluative conclusions derived from the report. Based on the facts uncovered by his extensive investigation, LCDR Morgan reached several conclusions that the district court admitted into evidence. Finding that the "aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash" (Opinion No. 1), LCDR Mor-

gan eliminated, in effect, a defect in the fuel control system as the cause of the accident. He concluded that based on his investigation there was no contributing command or supervisory error (Opinion No. 2). LCDR Morgan also found that neither LCDR Rainey nor ENS Knowlton had any physical or mental ailments that could have caused the crash (Opinion No. 3). Having eliminated several other possible causes of the crash, and based on (1) the statements of the other instructors and students engaged in the "touch and go" exercise, (2) air traffic control records, and (3) an analysis of the traffic pattern diagram for Middleton Field, LCDR Morgan concluded that "[t]he most probable cause of the accident was the pilots [sic] failure to maintain proper interval." (Opinion No. 7). In other words, in LCDR Morgan's professional judgment, pilot error caused the crash.

In my view, LCDR Morgan's conclusions that were admitted into evidence at trial are "factual findings" within the common sense meaning of that term and as contemplated by the Advisory Committee and the Senate Judiciary Committee. Moreover, consistent with the overall spirit of the Federal Rules of Evidence, LCDR Morgan's evaluative findings could certainly have been helpful to the jury.

For these reasons, the district court did not abuse its discretion when it admitted portions of LCDR Morgan's "opinions." I would nevertheless reverse the district court, concurring in the en banc court's judgment that the district court improperly restricted the cross-examination testimony of John Charles Rainey.